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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 269

MARGARET M. BRADY, AS ADMINISTRATRIX OF JAMES P. BRADY, DECEASED, PETITIONER,

vs.

ROOSEVELT STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 31, 1941.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MARGARET M. BRADY, as Administratrix of the goods, chattels and credits of James P. Brady, deceased, Plaintiff-Appellee,

vs.

ROOSEVELT STEAMSHIP COMPANY, INC., Defendant-Appellant

STATEMENT

1940

May 31—Summons and complaint served.
July 19—Filed certified record on removal.
July 24—Served answer.

1941

May 2—Served motion to dismiss for lack of jurisdiction of subject matter.
May 21—Opinion of Mandelbaum, J. filed denying motion to dismiss.
June 11—Second notice of motion for reargument of motion to dismiss.
July 8—Orders (2) entered denying motion to dismiss and denying motion for reargument thereof.
Oct. 17, 20 and 21—Trial before Coxe, J.
Oct. 28—Judgment entered for plaintiff $22,760.00.
Nov. 18—Notice of Appeal filed.

[fol. 2] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

COMPLAINT

The plaintiff complaining against the defendants, by Klein, Kingsley & Klein, her attorneys, respectfully alleges to the Court as follows:

For a First Cause of Action

First. Upon information and belief, that at all the times hereinafter mentioned, the defendant was and still

is a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, with authority to do business within the State of New York.

Second. Upon information and belief, that at all the times hereinafter mentioned, the defendant, its agents, servants and employees, operated and were in control of a certain ship known as the S. S. Unicoi, which said ship was at all the times hereinafter mentioned docked and moored at Pier 58, North River, in the Borough of Manhattan, City of New York.

Third. That on or about the 9th day of July, 1938, James P. Brady, deceased, plaintiff's intestate, was lawfully and properly at and about Pier 58 North River, in the Borough of Manhattan, City of New York, in the per- [fol. 3] formance of his duties as a Customs Inspector and was there for the purpose of making the usual and customary inspection of the ship hereinbefore referred to, which said ship is known as the S. S. Unicoi.

Fourth. That at the time and place hereinbefore referred to, it became necessary for James P. Brady, deceased, plaintiff's intestate to board the said ship by means of a ladder.

Fifth. Upon information and belief, that at all the times hereinafter mentioned, the defendant was the owner of a certain ladder, which was put over the side of the ship to afford access to it to such persons as would board the said ship, and which ladder, the plaintiff's intestate used in boarding the ship to perform his duties as a Customs Inspector.

Sixth. Upon information and belief, that at all the times hereinafter mentioned, the defendant, its agents, servants and employees, maintained and controlled the said ladder, which plaintiff's intestate used in boarding the ship to perform his duties as a Customs Inspector.

Seventh. That at the time and place hereinbefore referred to plaintiff's intestate, James P. Brady, deceased, did attempt to board the said ship and in doing so climbed up the said ladder, which ladder was furnished and supplied for this particular purpose by the defendant, its agents, servants and employees.

Eighth. At the time and place hereinbefore mentioned, and while the said James P. Brady, deceased, plaintiff's intestate, was climbing up the aforesaid ladder, suddenly and without notice or warning, one of the rungs of the [fol. 4] said ladder became loose, broken and gave way, causing the said James P. Brady, deceased, plaintiff's intestate, to lose his footing as a result of which he fell with great force and violence sustaining severe injuries, more particularly hereinafter referred to.

Ninth. That as a result of the foregoing, the plaintiff's intestate sustained severe injuries to his head, limbs and body, and certain internal injuries, as a result of which he died on the 20th day of July, 1938.

Tenth. That the aforesaid occurrence and resulting injuries in death were caused solely and wholly by carelessness, recklessness and negligence of the defendant, its agents, servants and employees, in that the said ladder was defective and out of repair and so maintained, and in that the said ladder was carelessly and negligently maintained by the defendant herein in permitting the same to be exposed to the elements for an unreasonable length of time, thereby causing the same to be and become weakened and insufficiently strong enough to sustain the weight of a single normal man who would have occasion to use the same; that the defendant, its agents, servants and employees, failed to properly examine and inspect the aforesaid ladder and the defendant further failed to exercise reasonable care and prudence in the premises and was otherwise negligent.

Eleventh. That all of the aforesaid were sustained only and solely through the carelessness and negligence of the defendant as aforesaid, and James P. Brady, deceased, plaintiff's intestate, was entirely free from any negligent act which contributed thereto.

Twelfth. That on or about the 3rd day of May, 1939, Limited Letters of Administration upon the Estate of the said James P. Brady, were duly issued and granted [fol. 5] by the Surrogate's Court of the County of Westchester, State of New York, to Margaret M. Brady, appointing her Administratrix of the goods, chattels and credits of the said deceased, and the plaintiff thereupon

duly qualified and entered upon her duties as such Administratrix, and is now such Administratrix.

Thirteenth. That the decedent left him surviving his widow, Margaret M. Brady, age 61, a son, James W. Brady, age 21, and a daughter, Virginia Brady, age 16 years.

Fourteenth. That the said James P. Brady, deceased, was of the age of 62 years at the time of his death, and prior thereto had been in good health and in possession of all his facilities, and was steadily employed at his work as that of a Customs Inspector, and that the aforesaid widow, son and daughter, have lost the companionship, comfort, society and services of the said James P. Brady, deceased, and the support from his contributions, and that they have been damaged by his death in the sum of $75,000.00.

Fifteenth. That this action was commenced within two (2) years after the death of the said James P. Brady, deceased.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Seventy-five Thousand ($75,000.00) Dollars damages, together with the costs and disbursements of this action.

For a Second Cause of Action

Sixteenth. Upon information and belief, that at all the times hereinafter mentioned, the defendant was and still is a [fol. 6] foreign corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, with authority to do business within the State of New York.

Seventeenth. Upon information and belief, that at all the times hereinafter mentioned, the defendant, its agents, servants and employees, operated and were in control of a certain ship known as the S. S. Unicoi, which said ship was at all the times hereinafter mentioned docked and moored at Pier 58, North River, in the Borough of Manhattan, City of New York.

Eighteenth. That on or about the 9th day of July, 1938, James P. Brady, deceased, plaintiff's intestate, was

lawfully and properly at and about Pier 58, North River, in the Borough of Manhattan, City of New York, in the performance of his duties as a Customs Inspector and was there for the purpose of making the usual and customary inspection of the ship hereinbefore referred to, which said ship is known as the S. S. Unicoi.

Nineteenth. That at the time and place hereinbefore referred to, it became necessary for James P. Brady, deceased, plaintiff's intestate, to board the said ship by means of a ladder.

Twentieth. Upon information and belief, that at all the times hereinafter mentioned, the defendant was the owner of a certain ladder, which was put over the side of the ship to afford access to it to such persons as would board the said ship, and which ladder, the plaintiff's intestate used in boarding the ship to perform his duties as a Customs Inspector.

Twenty-first. Upon information and belief, that at all the times hereinafter mentioned, the defendant, its agents, [fol. 7] servants and employees, maintained and controlled the said ladder, which plaintiff's intestate used in boarding the ship to perform his duties as a Customs Inspector.

Twenty-second. That at the time and place hereinbefore referred to, plaintiff's intestate, James P. Brady, deceased, did attempt to board the said ship and in doing so climbed up the said ladder, which ladder was furnished and supplied for this particular purpose by the defendant, its agents, servants and employees.

Twenty-third. At the time and place hereinbefore mentioned, and while the said James P. Brady, deceased, plaintiff's intestate, was climbing up the aforesaid ladder, suddenly and without notice or warning, one of the rungs of the said ladder became loose, broken and gave way, causing the said James P. Brady, deceased, plaintiff's intestate, to lose his footing as a result of which he fell with great force and violence sustaining severe injuries, more particularly hereinafter referred to.

Twenty-fourth. That as a result of the foregoing, the plaintiff's intestate sustained severe injuries to his head, limbs and body, and certain internal injuries, as a result of which he died on the 20th day of July, 1938.

Twenty-fifth. That the aforesaid occurrence and resulting injuries in death were caused solely and wholly by the carelessness, recklessness and negligence of the defendant, its agents, servants and employees, in that the said ladder was defective and out of repair and so maintained, and in that the said ladder was carelessly and negligently maintained by the defendant herein in permitting the same to be exposed to the elements for an unreasonable length [fol. 8] of time, thereby causing the same to be and become weakened and insufficiently strong enough to sustain the weight of a single normal man who would have occasion to use the same; that the defendant, its agents, servants and employees, failed to properly examine and inspect the aforesaid ladder and the defendant further failed to exercise reasonable care and prudence in the premises and was otherwise negligent.

Twenty-sixth. That all of the aforesaid were sustained only and solely through the carelessness and negligence of the defendant as aforesaid, and James P. Brady, deceased, plaintiff's intestate, was entirely free from any negligent act which contributed thereto.

Twenty-seventh. That on or about the 3rd day of May, 1939, Limited Letters of Administration upon the Estate of the said James P. Brady, were duly issued and granted by the Surrogate's Court of the County of Westchester, State of New York, to Margaret M. Brady, appointing her Administratrix of the goods, chattels and credits of the said deceased, and the plaintiff thereupon duly qualified and entered upon her duties as such Administratrix, and is now such Administratrix.

Twenty-eighth. That the decedent left him surviving his widow, Margaret M. Brady, age 61, a son, James W. Brady, age 21, and a daughter, Virginia Brady, age 16 years.

Twenty-ninth. That this action was commenced within two (2) years after the death of the said James P. Brady, deceased.

Thirtieth. That as a result of the foregoing, plaintiff's intestate sustained severe injuries to his head, limbs and [fol. 9] body, a severe shock to his nervous system and certain internal injuries and has been caused to suffer severe

physical pain and mental anguish, from the date of said occurrence until the date of his death on July 20th, 1938; that during this period of time, plaintiff's intestate was confined to his bed and home as a result thereof and was caused to abstain from the duties of his vocation, and was compelled to expend and become obligated to expend sums of money for medical attention and medicines.

Thirty-first. That the plaintiff as Administratrix of the goods, chattels and credits of the said James P. Brady, now deceased, has a right of action to recover damages for personal injuries accruing before the death of the said James P. Brady, pursuant to the provisions of the Decendent's Estate Law, Sections 119 and 120 thereof.

Wherefore, the plaintiff demands judgment against the defendant on the First Cause of Action, for the sum of Seventy-five Thousand ($75,000.00) Dollars damages, together with the costs and disbursements of the action, and on the Second Cause of Action for the sum of Five Thousand ($5,000.00) Dollars damages, together with the costs and disbursements of the action.

Klein, Kinsley & Klein, Attorneys for Plaintiffs,
Office & P. O. Address, No. 342 Madison Avenue,
Borough of Manhattan, City of New York.

[fol. 10] In United States District Court, Southern District of New York

Answer

Roosevelt Steamship Company, Inc., the defendant herein, answering the complaint by its attorneys, Kirlin, Campbell, Hickox, Keating & McGrann, alleges on information and belief as follows:

Answering the First Cause of Action

First. It admits the allegations contained in paragraph numbered First of the complaint.

Second. It denies each and every allegation contained in paragraph numbered Second of the complaint.

Third. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every

allegation contained in paragraph numbered Third of the complaint..

Fourth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Fourth of the complaint.

Fifth. It denies each and every allegation contained in paragraph numbered Fifth of the complaint.

Sixth. It denies each and every allegation contained in paragraph numbered Sixth of the complaint.

[fol. 11] Seventh. It denies each and every allegation contained in paragraph numbered Seventh of the complaint.

Eighth. It denies each and every allegation contained in paragraph numbered Eighth of the complaint.

Ninth. It denies each and every allegation contained in paragraph numbered Ninth of the complaint.

Tenth. It denies each and every allegation contained in paragraph numbered Tenth of the complaint.

Eleventh. It denies each and every allegation contained in paragraph numbered Eleventh of the complaint.

Twelfth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Twelfth of the complaint.

Thirteenth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Thirteenth of the complaint.

Fourteenth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Fourteenth of the complaint.

Fifteenth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Fifteenth of the complaint.

[fol. 12] Further Answering the Complaint, and Particularly the second Alleged Cause of Action Contained Therein, the Defendant Further Alleges:

Sixteenth. It admits the allegations contained in paragraph numbered Sixteenth of the complaint.

Seventeenth. It denies each and every allegation contained in paragraph numbered Seventeenth of the complaint.

Eighteenth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Eighteenth of the complaint.

Nineteenth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Nineteenth of the complaint.

Twentieth. It denies each and every allegation contained in paragraph numbered Twentieth of the complaint.

Twenty-first. It denies each and every allegation contained in paragraph numbered Twenty-first of the complaint.

Twenty-second. It denies each and every allegation contained in paragraph numbered Twenty-second of the complaint.

Twenty-third. It denies each and every allegation contained in paragraph numbered Twenty-third of the complaint.

[fol. 13] Twenty-fourth. It denies each and every allegation contained in paragraph numbered Twenty-fourth of the complaint.

Twenty-fifth. It denies each and every allegation contained in paragraph numbered Twenty-fifth of the complaint.

Twenty-sixth. It denies each and every allegation contained in paragraph numbered Twenty-sixth of the complaint.

Twenty-seventh. It denies that it has any knowledge or information sufficient to form a belief thereof as to each

and every allegation contained in paragraph numbered Twenty-seventh of the complaint.

Twenty-eighth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Twenty-eighth of the complaint.

Twenty-ninth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Twenty-ninth of the complaint.

Thirtieth. It denies each and every allegation contained in paragraph numbered Thirtieth of the complaint.

Thirty-first. It denies each and every allegation contained in paragraph numbered Thirty-first of the complaint.

[fol. 14] Further Answering the Complaint, and as a First, Separate, Complete and Distinct Defense Thereto, Defendant Alleges Upon Information and Belief as Follows:

Thirty-second. That if the plaintiff's intestate received any injuries, as alleged in the complaint, said injuries were caused in whole or in part by plaintiff's intestate's own negligence, and were not caused or contributed to in any manner by any negligence of this defendant.

Further Answering the Complaint, and as a Second, Separate, Complete and Distinct Defense Thereto, Defendant Alleges Upon Information and Belief as Follows:

Thirty-third. That the injuries to plaintiff's intestate arose out of certain risks, dangers and hazards, all of which were open, obvious and well known to plaintiff's intestate at and before the said injury, and all of said risks, dangers and hazards had been assumed by plaintiff's intestate.

Wherefore this defendant demands that the complaint herein be dismissed with costs to the defendant as against the plaintiff, and for such other, further and different relief as the justice of the cause may require.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, by Raymond Parmer, a member of the firm, Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

[fol. 15] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS

SIRS:

Please take notice that on the annexed affidavit of Raymond Parmer, sworn to the 30th day of April, 1941, on the affidavit of William E. Collins, sworn to on the 1st day of May, 1941, on the examination of Andrew F. Finch, sworn to on October 8, 1940, on the written contract made between the defendant and the United States Maritime Commission on June 28, 1937, and on all the pleadings and proceedings heretofore had herein, the defendant will move this court, at a stated term for the hearing of motions, to be held in Room 506, United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 6th day of May, 1941, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein, on the ground that the court has not jurisdiction of the subject matter of the action.

And for such other, further and different relief as the justice of the cause may require.

Dated, New York, April 29, 1941.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Roosevelt Steamship Company, Inc., Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

[fol. 16] To: Klein, Kingsley & Klein, Esqs., Attorneys for Plaintiff, Office & P. O. Address, 342 Madison Avenue, Borough of Manhattan, City of New York.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RAYMOND PARMER IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

Raymond Parmer, being duly sworn, says:

I am an attorney at law and a member of the firm of Kirlin, Campbell, Hickox, Keating & McGrann, attorneys for the defendant, Roosevelt Steamship Company, Inc.

The plaintiff claims that her husband was a customs guard and that on July 9, 1938, he was climbing a ladder tied to the steamship Unicoi, when the ladder broke. This, it is claimed, caused him to be injured by reason of which he died on July 20, 1938. It is understood that he died of appendicitis.

As appears by the papers on which this motion is made, the steamship Unicoi was a vessel owned and operated by the United States of America at the time of the alleged injury to the plaintiff's intestate. Roosevelt Steamship Company, Inc., the present defendant, was employed as [fol. 17] a managing agent on behalf of United States of America in connection with the operation of the vessel. This appears by the testimony of Andrew F. Finch, taken on behalf of the plaintiff on September 17, 1940, a copy of which is annexed hereto. It appears also, by reason of the contract between the defendant, Roosevelt Steamship Company, Inc., and the United States Maritime Commission, dated June 28, 1937, a copy of which is annexed hereto.

It appears further that the defendant, Roosevelt Steamship Company, Inc., did not possess or operate the steamship Unicoi on its own behalf but on behalf of the United States of America. Both the profits and the losses belong to the United States.

By reason of this any suit on account of a tort occurring to plaintiff's intestate should be brought pursuant to the Suits in Admiralty Act against the United States of America. It is not proper to sue Roosevelt Steamship Company, Inc., the agent of the United States.

In *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, the Supreme Court of the United States said, at p. 326:

"On the facts above stated it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions."

And at p. 327, it said:

"It follows that on disclosure—whether by pleading or proof—of the facts aforesaid, the District Court should have dismissed each case for lack of jurisdiction."

[fol. 18] The above was said with regard to suits brought not only against the Shipping Board but also as regards suits brought against private corporations who were acting on behalf of the United States.

The United States Maritime Commission is the successor of the United States Shipping Board Emergency Fleet Corporation.

If any judgment should be obtained against Roosevelt Steamship Company, Inc., the money required to pay it would come from the United States Treasury. It would be one of the agent's expenses which the United States has agreed to pay.

Annexed hereto the court will find also the affidavit of William E. Collins, United States Attorney in charge of maritime matters at New York. His affidavit speaks for itself. It is submitted so that there can be no doubt that this is a case where suit should be brought against the United States of America under the Suits in Admiralty Act because the United States is the real party affected.

Wherefore I respectfully pray, on behalf of Roosevelt Steamship Company, Inc., that the present action be dismissed for lack of jurisdiction.

Raymond Parmer.

Sworn to before me this 30th day of April, 1941.
Andrew J. Doyle, Notary Public, Queens County.

[fol. 19] In United States District Court

Affidavit of William E. Collins in Support of Motion

State of New York,
County of New York, ss:

William E. Collins, being duly sworn, deposes and says:

I am District Counsel of the United States Maritime Commission for the North Atlantic District, and Special Assistant to the United States Attorney for the Southern District of New York, and as such, am generally in charge of admiralty matters for the United States Government in this district.

I have read the affidavit of Raymond Parmer, Esq., verified May 1st, 1941, and other papers attached to the

notice of motion made by the defendant herein, for an order dismissing the complaint for lack of jurisdiction.

I am submitting this affidavit in support of the motion because of the interest of the United States of America, as represented by the United States Maritime Commission, owner of the M/S Unicoi at the times involved in the action, as well as because of the interest of the Government in the question involved.

The M/S Unicoi was at the times involved in the action, operated by Roosevelt Steamship Company, Inc., as agent for the United States of America, pursuant to an operating agreement on the form known as "Temporary [fol. 20] Operating Agreement 1937." This agreement is in all substantial respects similar to the older so-called "M. O. 4 Agreement" between the Government, as represented by the former United States Shipping Board, and its operating companies. The latter agreement was held by the United States Circuit Court of Appeals for the Second Circuit to be clearly an agency agreement. *Admiral Oriental Line* v. *United States*, 86 Fed. (2d) 201.

Under both agreements, expenses of operation have been paid by United States Treasury funds. Any judgment which the plaintiff in this case might obtain against the Roosevelt Steamship Company, Inc., would be paid out of the United States Treasury.

In such circumstances, as has been pointed out in the said affidavit of Raymond Parmer, Esq., the Supreme Court has held that suit on any maritime cause of action must be brought against the United States. *Johnson* v. *Fleet Corporation*, 280 U. S. 320.

The Government, through the former United States Shipping Board, and the present United States Maritime Commission, has accordingly taken the uniform position that such actions should be brought in admiralty.

Accordingly, after the decision in the Johnson case, numerous cases in the Federal and State courts were dismissed for lack of jurisdiction of the subject matter, on the authority of the Johnson case. Among the numerous cases thus dismissed were the following, as taken from the files in my office:

Shea v. *Export Steamship Corporation and United States Shipping Board Emergency Fleet Corporation*, 253 N. Y. 17.

Riley v. *Fleet Corporation and Mississippi Shipping Co.*, S. D. N. Y., Index No. L 45-11, dismissed April 4, 1930.
[fol. 21] *Nelson* v. *Consolidated Navigation Co., Inc.*, City Court, City of New York, Index No. 13331—1930, dismissed May 8, 1930.

Burke v. *A. H. Bull & Co., Inc.*, Supreme Court, Richmond County, no index number, dismissed April 15, 1930.

Kluyskens v. *Black Diamond Steamship Corporation*, Municipal Court, Manhattan, First District, Index No. 31949—1929, dismissed April 12, 1930.

Accordingly it is submitted that the above entitled action should be dismissed for lack of jurisdiction of the subject matter.

This affidavit is submitted in support of the application made by Roosevelt Steamship Company, Inc., the defendant herein, and the United States does not thereby appear in this proceeding nor submit itself to the jurisdiction of this Court.

William E. Collins.

Sworn to before me this 1st day of May, 1941.
Robert M. Estes, Notary Public, New York County.

[fol. 22] In United States District Court

Examination Before Trial of Andrew F. Finch Submitted in Support of Motion

Examination before trial of Andrew F. Finch, Assistant Comptroller of defendant, returnable and held on the 17th day of September, 1940, at 11 A. M. at the office of Kirlin, Campbell, Hickox, Keating & McGrann, 120 Broadway, New York City.

Appearances:

Charles Kramer, of counsel for plaintiff.
Raymond Parmer, of counsel for defendant.
Andrew F. Finch, in person.

Examination:

Q. What is your full name?
A. Andrew F. Finch.

Q. Where do you reside?

A. 721 49th Street, Brooklyn, N. Y.

Q. In what capacity are you connected with the defendant?

A. Assistant Comptroller.

Q. And for how many years have you been the Assistant Comptroller?

A. Since 1936. Prior to that time from 1925 to 1936, treasurer.

Q. As Assistant Comptroller, generally, what are your duties?

A. To do with all the financial matters connected with the firm.

Q. Are you familiar with the ship S. S. Unicoi?

A. Yes.

Q. What type of a ship was it?

A. It was a motor ship, freight carrying vessel.

[fol. 23] Q. Approximately how many tons was it, if you know?

A. Around 9000 dead weight tons.

Q. Do you know how long the boat was?

A. About 400 feet, I should say.

Q. What type of cargo did it carry?

A. Various types, general cargo, all types.

Q. Was it an ocean going boat?

A. Yes.

Q. Did it carry passengers?

A. The Unicoi, I believe, had accommodations for 12 passengers.

Q. On or about July 9th, 1938, the day of the accident to James P. Brady, how large was its crew?

A. The crew was 35 to 36 in number at all times.

Q. That includes the captain, and all the sailors and seaman?

A. Yes.

Q. And did the boat have any particular points where it would travel to and from?

A. Yes, it was scheduled in North Atlantic ports and proceeded to ports in India and return to the United States ports.

Q. Who owned the boat?

A. The United States Maritime Commission.

Q. What year did the United States Maritime Commission own the boat?

A. I don't know exactly what year.
Q. Approximately?
A. Around 1920.
Q. Who owned the boat before him in 1920?
A. I don't know.
Q. Was that the year the boat was built?
A. I am pretty sure it was around that time that the boat was built.
Q. Did the defendant operate the boat?
A. Yes.
Q. Did the defendant operate the boat on July 9th, 1938 and prior thereto?
A. Yes.
Q. Was there a contract entered into between the U. S. Maritime Commission and the defendant with reference to the operation of the boat?
A. Yes.
[fol. 24] Q. Is that a written contract?
A. Yes.
Q. May I see it please?

(Contract shown to Mr. Kramer.)

Q. How long does this contract run?
A. It was for six months originally and has been extended from time to time.
Q. And was the contract in operation on July 9th, 1938?
A. Yes.
Mr. Kramer: May I have a copy of this contract?
Mr. Parmer: I will furnish the plaintiff with a photostatic copy of the agreement entered into between the United States Maritime Commission and the defendant on June 28th, 1937 with reference to the operation of the boat S. S. Unicoi.
Mr. Kramer: Page 2 of the operating agreement provides:

1. *Appointment & Acceptance:* The Owner (United States Maritime Commission, hereby designates the Managing Agent (Roosevelt Steamship Company, Inc.) as its Managing Agent to manage, operate, and conduct the business of the Line for the period, in the manner, and subject to the terms and conditions herein set forth, for and on behalf of the Owner and under its supervision and direction. The managing Agent hereby accepts said appointment.

Mr. Kramer: Paragraph 7 provides:

7. *Managing Agent to Man, Supply and Operate:* The Managing Agent agrees to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe; and to certify or [fol. 25] approve for payment by the Owner the true cost thereof and all other costs and expenses, except overhead, incident to the management, operation and conduct of business of the vessels as the Owner may from time to time direct. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such employees if it shall have reason to be dissatisfied.

Q. Under paragraph 7 of the agreement, am I correct in saying that the defendant hired the men on the boat subject to the supervision of the government?

A. No.

Q. How would you say that?

A. We had nothing to do with the hiring of the men outside of the licensed officers whom we chose.

Q. Did you hire the licensed officers?

A. We recommended the licensed officer to the government for approval.

Q. What do you mean by licensed officers?

A. Chief officers, first mate, chief engineer, assistant chief engineer, chief steward, second mate and captain.

Mr. Kramer: Paragraph 11 provides:

11. *Repairs and Maintenance:* The Managing Agent shall, subject to such regulations or methods of supervision and inspection as may be required or prescribed by the Owner, exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and will effect maintenance and voyage repairs and replacements. No extraordinary repairs or expenses of any kind shall be made by the Managing Agent except in cases of serious emergency without first securing in writing the authorization of the Owner.

[fol. 26] Q. Did the defendant hire the captain of the S. S. Unicoi?

A. The captain was recommended to the Maritime Commission by the defendant.

Q. Was he accepted?

A. Yes.

Q. What was the name of the Captain of the S. S. Unicoi on July 9th, 1938?

A. Mr. Joseph Dixon.

Q. Did the defendant also hire the other officers of the S. S. Unicoi on or prior to July 9th, 1938?

A. The other officers of the Unicoi were also recommended to the Maritime Commission for approval.

Q. And were they approved?

A. Yes.

Q. How long had Captain Dixon been the captain of the S. S. Unicoi prior to July 9th, 1938?

A. I cannot state off hand without looking up the record.

Q. Did the defendants hire the rest of the crew aside from the officers of the S. S. Unicoi on or prior to July 9th, 1938?

A. No.

Q. Did they recommend the employees?

A. No.

Q. Who hired them?

A. The Maritime Commission.

Q. Did the defendant approve the selection by the Maritime Commission of the crew?

A. We had nothing to say in the matter.

Q. Are you familiar with the docking of the S. S. Unicoi at pier 58, North River, in the Borough of Manhattan, on or prior to July 9th, 1938?

A. I was not present at the docking.

Q. Do you know when it was that the boat docked?

A. From the records, she docked on July 9th, 1938.

Q. At about what time?

A. I don't know.

Q. Would your records indicate that?

A. Yes.

Q. Do you have the records with you?

A. No.

Q. Where had the boat started from prior to its arrival at pier 58 on July 9th, 1938?

A. Port Said, Egypt.

Q. Did it have cargo on board that was to be unloaded at pier 58?

A. Yes.

[fol. 27] Q. Did it carry any passengers on that trip?

A. I cannot say without looking up the record.

Q. Will you fill it in?

A. Yes. Carried 5 adults and 1 child.

Q. Are you familiar with the practice of custom inspectors of boarding the boat when they dock?

A. No, sir.

Q. Who would be?

A. Our port superintendent or port captain.

Q. What are their names?

A. The port superintendent is Peter Fay and the captain was Captain Cummings.

Q. Are they both in the employ of the defendant?

A. Yes.

Q. Do you have any statement in your file from either Peter Fay or Captain Cummings with reference to the accident to James P. Brady on July 9th, 1938?

A. I don't have such a record in my file. I believe the record will be on file in the claim department of the company.

Mr. Kramer: Mr. Parmer, will you furnish us with a copy of the report?

Mr. Parmer: I do not agree to do that.

Mr. Kramer: Will you agree to let us look at it?

Mr. Parmer: No.

Q. Are you familiar with the facts surrounding the accident that occurred to James P. Brady while boarding the S. S. Unicoi on July 9th, 1938?

A. No, sir.

Q. Do you know who is familiar with it?

A. No.

Q. Are you familiar with the use of the ladder put over the side of the boat to permit persons to board the ship and particularly the deceased, James P. Brady who was a customs inspector on the day of the accident?

A. No.

Q. Are you familiar with any of the circumstances surrounding the accident that occurred to James P. Brady on July 9th, 1938?

A. No, sir.

[fol. 28] Q. Do you know who is?

A. No, sir.

Q. Well, who would be?

A. Perhaps the pier superintendent, Mr. Fay. I wouldn't know.

Q. When was the first time you learned about the accident to James P. Brady on July 9th, 1938?

A. Only very recently.

Q. Do you know whether the accident was reported to the company?

A. No, sir, I don't.

Mr. Kramer: This examination before trial is concluded as to the testimony of this witness, but without prejudice to the plaintiff to examine such other witnesses it sees fit.

(sgd.) Andrew F. Finch

Sworn to before me this 8 day of October, 1940.
(Sgd.) Terence F. Conlon, N. P. (Seal.)

PLAINTIFF'S EXHIBIT No. 2

Temporary Operating Agreement 1937

This Agreement made on the 28th day of June, 1937, between the United States Maritime Commission, hereinafter sometimes designated as the Owner, and Roosevelt Steamship Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereinafter designated as the Managing Agent.

Whereas, the Commission is the Owner of the following vessels (herein sometimes referred to as the Owner's ves-[fol. 29] sels) presently managed and operated for its account by the Managing Agent in a Line known as the American Pioneer Line (herein sometimes referred to as the Line):

Name	*Deadweight Tons*
MS. City of Dalhart	9185
MS. City of Elwood	9116
MS. City of Rayville	9050
MS. Jeff Davis	9183
MS. New Orleans	9084
MS. Potter	9000
MS. Sawokla	9105
MS. Tampa	9120
MS. Unicoi	9135
MS. Ward	9009
MS. Wichita	9147
MS. Yomachichi	9235

and

Whereas, pursuant to Section 704 of the Merchant Marine Act, 1936, (herein referred to as the Act) the existing Operating Agreement with respect to the Line is to be terminated and discontinued by June 29, 1937, and no voyages may be commenced under said agreement on or after that date; and

Whereas, pursuant to the provisions of the Act, and particularly Sections 705, 706, and 707 thereof, the Owner has advertised the Line for charter but, having failed to receive satisfactory bids has, pursuant to Section 707 of the Act and the provisions of said advertisement, rejected all bids and determined, pursuant to Section 707(c), to operate the Line until conditions appear to be more favorable for the sale of such vessels or a re-advertising of the Line for private charter; and

[fol. 30] Whereas, considering particularly the public interest in the continued operation of the Line, the practical impossibility of satisfactorily readvertising the Line or providing for the establishment of a managing staff prior to the expiration of the present Operating Agreement, and the desirability of avoiding the danger of disruption of service through change in management during the limited period of this agreement, the Owner has determined that, in order to carry on the activities authorized by the Act, it is necessary for the Owner to enter into this agreement for the operation of the Line for its account by the Managing Agent for the period and subject to the terms and conditions hereinafter set forth; and

Whereas, the Managing Agent has indicated its willingness to undertake the management and operation of the Line for said period and subject to said terms and conditions;

Now, Therefore, in consideration of the premises and of the covenants and agreements herein set forth, the parties hereto agree as follows:

1. *Appointment and Acceptance.* The Owner hereby designates the Managing Agent as its Managing Agent to manage, operate, and conduct the business of the Line for the period, in the manner, and subject to the terms and conditions herein set forth, for and on behalf of the Owner and under its supervision and direction. The Managing Agent hereby accepts said appointment.

2. *Period of Agreement.* Subject to the terms and conditions set forth herein, this agreement shall apply to all voyages commenced on or after June 29, 1937, and on or before December 31, 1937; provided, however, that the [fol. 31] Owner may terminate this agreement upon thirty (30) days' written notice to the Managing Agent, in which event no voyage shall be commenced under this agreement after the expiration of such thirty day period. A voyage shall be deemed to commence when the preceding voyage has been terminated and new voyage activity has started. The Owner may determine in particular cases or by general regulations the time of termination of old voyages and commencement of new voyage activity. In determining whether or not a voyage is commenced within the period of this agreement, in case of a lapse of time between the termination of a voyage and the commencement of a new voyage activity, however, the new voyage shall not be antedated to the time of termination of the old voyage.

3. *Allocation of Vessels.* The Owner hereby allocates the above named to the Managing Agent for management and operation under this agreement. It is understood that other vessels may hereafter be substituted for or added to the aforesaid vessels from time to time, and that the Owner may withdraw any vessel or vessels now or hereafter allocated for service on the Line which, in the judgment of the Owner, is not required in the operation of the Line.

4. *Trade, Route and Trade Name.* The Managing Agent shall manage and operate said vessels on the following berth service, and not otherwise:

(a) Between United States Atlantic and Gulf ports via the Suez Canal and ports in the Red Sea, India and Ceylon in the Karachi-Calcutta range, with the privilege of calling at ports in Burma and North Atlantic Canadian ports.

[fol. 32] (b) Between United States Atlantic and Gulf ports and ports in Australia via the Panama Canal with option of calls at ports in New Zealand and/or Tasmania or other ports en route and with the privilege of calling at North Atlantic Canadian ports.

(c) Between United States Atlantic ports via Panama Canal and ports in Hawaii, Philippine Islands, China, Japan and other Far East ports and with the privilege of calling at North Atlantic Canadian ports.

The Managing Agent shall manage and operate the said vessels exclusively under the trade name AMERICAN PIONEER LINE. Such trade name shall remain the property of the Owner and the Managing Agent shall have no further right to the use of said trade name upon termination of this agreement as herein provided.

5. *Sailing Schedule: Interruption of Service.* The Managing Agent agrees that during the period of this agreement, it will make minimum sailings at the rate of ten (10) outward sailings per year on the berth service described in clause (a) of Article 4 hereinabove, and at the rate of nine (9) outward sailings per year on each berth service described in clauses (b) and (c) of Article 4 hereinabove, on sailing schedules fixed or approved by the Owner. Failure of the Managing Agent to make a voyage in accordance with any such schedule shall not be deemed to be a breach of its obligations under this agreement if it is prevented from making such voyage by acts of God, force majeure, accident, strikes or other labor disturbances, war, insurrections, weather conditions, loss of or damage to vessels, or, without limiting the foregoing, any other cause not within the control of the Managing Agent, whether of the class of causes hereinabove enumerated or not, it being understood that the cause of any interruption in so far as it [fol. 33] may be under the control of the Managing Agent shall be remedied by the Managing Agent, as directed by the Owner, with all reasonable dispatch and performance resumed at the earliest practicable time after cessation of the cause of such interruption.

6. *Conduct of Business of the Line.* The vessels shall be used only for the carriage of lawful merchandise and passengers. All business shall be carried on in the name of the Line for the account of the Owner. The Managing Agent shall, as directed by the Owner, collect all monies and shall certify or approve for payment by the Owner, vouchers covering all expenses incident to the management and operation of the Line, the maintenance and operation of the vessels, and all other business activities pertaining thereto. The Managing Agent shall account to the Owner for all monies collected by it or its subagents or monies disbursed by its subagents. The Managing Agent agrees to continue to book cargo for the vessels of the Line for

voyages beyond the termination of this agreement, provided that all such commitments shall be subject to such instructions as may be issued by the Owner.

7. *Managing Agent to Man, Supply and Operate.* The Managing Agent agrees to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe, and to certify or approve for payment by the Owner the true cost thereof and all other costs and expenses, except overhead, incident to the management, operation and conduct of business of the vessels as the Owner may from time to time direct. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such em-
[fol. 34] ployees if it shall have reason to be dissatisfied.

8. *Lawful and Efficient Operation.* The Managing Agent agrees to conduct its operations with respect to the vessels, services, routes and Line referred to in this agreement in full compliance with the applicable provisions of law, and particularly the Act, and in the most economical and efficient manner, but with due regard to the wage and manning scales and working conditions prescribed by the Owner. The Managing Agent shall exercise due diligence to protect and safeguard the interests of the Owner in all respects, and to avoid loss and damage of every nature to the Owner.

9. *Minimum Manning and Wage Scales and Reasonable Working Conditions.* It is understood and agreed that at all times during the period of this agreement, there shall be strict compliance in the operation of the Line with the minimum manning scales and minimum wage scales and the requirements as to reasonable working conditions now or hereafter adopted by the Owner pursuant to Section 301(a) of the Act and in effect from time to time. The Managing Agent will post and keep posted in a conspicuous place on each vessel operated by it a copy of such minimum manning and wage scales and working conditions then in effect and applicable to such vessel, printed in type satisfactory to the Owner.

10. *Vessel Personnel.* It is understood and agreed that the period of this agreement:

In so far as is practicable, officers' living quarters shall be kept separate and apart from those furnished for members of the crew;

[fol. 35] Licensed officers and unlicensed members of the crew shall be entitled to make complaints or recommendations to the Commission, Coast Guard, or Department of Labor, providing they file such complaint or recommendation with their immediate superior, who shall be required to forward such complaint or recommendation with his remarks to the Commission, Coast Guard, or Department of Labor;

Licensed officers who are members of the Naval Reserve Corps shall wear on their uniforms such special distinguishing insignia as may be approved by the Secretary of the Navy; officers being those men serving under licenses issued by the Bureau of Marine Inspection and Navigation of the Department of Commerce;

The uniform stripes, decoration, or other insignia shall be of gold braid or woven gold or silver material, to be worn by officers, and no member of the ship's crew other than licensed officers shall be allowed to wear any uniform with such officer's identifying insignia;

No discrimination shall be practiced against licensed officers, who are otherwise qualified, because of their failure to qualify as members of the Naval Reserve Corps;

Licensed officers shall take their meals in the main dining salon of the vessel and no other place during regular meal hours, except in cases of emergency.

[fol. 36] 11. *Repairs and Maintenance.* The Managing Agent shall, subject to such regulations or methods of supervision and inspection as may be required or prescribed by the Owner, exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and will effect maintenance and voyage repairs and replacements. No extraordinary repairs or expenses of any kind shall be made by the Managing Agent except in cases of serious emergency without first securing in writing the authorization of the Owner.

12. *Surveys and Inspections.* The Owner shall have the right at any time without notice to survey any of the vessels operated by the Managing Agent hereunder to satisfy itself that they are being properly maintained, and the Managing Agent shall make, for the account of the Owner, such repairs as may be determined to be necessary. The Managing Agent agrees to comply fully with all instructions of the Owner with respect to the inspection of said vessels and to give such representatives as the Owner may designate from time to time full, free, and complete access at all reasonable times, to all parts of the vessels, and to cooperate with such representatives in the making of any inspection or investigation which the Owner may deem desirable.

13. *Accounting and Reports.*

(a) The Managing Agent and every affiliate, domestic agent, subsidiary, or holding company connected with, or directly or indirectly controlling or controlled by, the Managing Agent (1) shall keep its books, records, and accounts relating to the maintenance, operation, and serv- [fol. 37] icing of the vessel or vessels, services, routes, and Line covered by this agreement in such form and under such regulations as may be prescribed by the Owner, but the Owner shall not require the duplication of books, records, and accounts required to be kept in some other form by the Interstate Commerce Commission; and (2) shall file, upon notice from the Owner, balance sheets, profit and loss statements, and such other statements of financial operations, special reports, memoranda of any facts and transactions, which in the opinion of the Owner affect the financial results in, the performance of, or transactions or operations under, this agreement.

(b) The Owner is hereby authorized to examine and audit the books, records and accounts of all persons referred to above in this article whenever it may deem it necessary or desirable, including an analysis of the surplus and all supporting accounts.

(c) Upon the willful failure or willful refusal of any person described in this article to comply with the above provision, the Owner shall have the right to rescind this agreement, and upon such rescission, the Owner shall be relieved of all further liability under this agreement.

14. *Insurance.* The Owner shall provide, without cost or expense to the Managing Agent, hull machinery, and port risk insurance, and the Managing Agent shall provide, for the account of the Owner and subject to its approval, Protection and Indemnity, and such other forms of insurance as the Owner may deem necessary.

15. *Traffic Contracts.* All traffic contracts shall be for the account of the Owner and all documents such as bills of lading, contracts of affreightment, etc., shall be in accordance with the terms, conditions, and forms prescribed by the Owner.

[fol. 38] 16. *General Average.* In cases of casualty or vessel disability necessitating declaration of general average, the Managing Agent agrees to appoint an average adjuster from an approved list of adjusters furnished by the Owner; to obtain adequate general average security from the cargo, asserting liens for that purpose if necessary; to supply the adjuster with all disbursement accounts, documents and data required in the adjustment of the average; and to take all other necessary measures, including such legal action as may be directed by the Owner for the protection of the interests of all concerned in the general average. For such service, including any other service required of the Managing Agent in general average cases, the Managing Agent shall receive a special fee to be fixed by agreement, in each case, with the Owner, and also, when deemed necessary by the Owner, by agreement with the other interests involved, and the Managing Agent shall claim allowance therefor in general average as a charge of service rendered in the general interest. It is understood and agreed, however, that the Owner shall be liable only for the vessel's proportion of such special fee, as apportioned in the general average adjustment, and that payment of this fee, or any portion of it, shall be contingent on the completion, issuance, and, if desired by the Owner, acceptance and/or settlement of the general average statement by all contributing interests.

17. *Salvage.* Salvage claims for services rendered to vessels other than vessels owned or controlled by the Owner shall be handled by, and be under the control of, the Owner. Salvage awards for services rendered to other vessels

owned or controlled by the Owner, including other vessels of the Line, shall be made by the Owner.

78. *Bond.* Before this agreement becomes operative, the Managing Agent agrees that it will furnish and maintain [fol. 39] during the period of this agreement at its own expense a bond with sufficient corporate surety, in the amount of Eighty Thousand Dollars ($80,000.00), such bond to be approved by the Owner both as to form and sufficiency of surety, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the Managing Agent contained in this agreement, including without limitation of the foregoing the condition to faithfully account to the Owner for all funds or property received by the Managing Agent, its subagents, master and other licensed officers of vessels allocated hereunder, and for funds disbursed by its subagents and by the Owner upon approval of the Managing Agent. The Managing Agent may, in lieu of furnishing such bond, pledge U. S. Government securities, $80,000.00 face value, under an agreement satisfactory in form to the Owner.

19. *Payment of Overhead.* The Owner agrees to pay to the Managing Agent the actual overhead expenses of the Managing Agent determined by the Owner to have been fairly and reasonably incurred and to be properly applicable to the management and operation of the Commission's vessels under this agreement. Payment hereunder shall be made and adjusted as follows:

(a) The Owner shall pay to the Managing Agent within ten (10) days after the conclusion of each calendar month during which voyages may be commenced under this agreement, the sum of Thirteen Thousand, Three Hundred Thirty-three Dollars and Thirty-three Cents ($13,333.33) but such installment shall be reduced by all amounts due to the Managing Agent for overhead and paid in respect of voyages terminated during said month under the Operating Agreement, 1935.

[fol. 40] (b) The Owner shall pay to the Managing Agent within ten (10) days after the conclusion of each calendar month during the term of this agreement in which the commencement of voyages shall not be authorized hereunder, a sum bearing the same ratio to $13,333.33 as the total voyage

days during such month of operation of the Commission's vessels under this agreement bears to the product of twelve times the number of days in such month.

(c) As soon as practicable after the termination of the last voyage hereunder, there shall be a final adjustment and at that time the Owner shall pay to the Managing Agent the excess of actual overhead expenses of the Managing Agent determined by the Owner to have been fairly and reasonably incurred and to be properly applicable to the management and operation of the Commission's vessels under this agreement over the aggregate of all installments of overhead theretofore paid hereunder. Any excess of such installments over such overhead expense as so determined shall be repaid to the Owner by the Managing Agent.

20. *Salaries and Fees of Directors, etc.* No director, officer, or employee (which term shall be construed in the broadest sense to include, but not to be limited to, managing trustee or other administrative agent), shall receive from the Managing Agent and its affiliate, subsidiary, associate, directly or indirectly, wages, salary, allowances of compensation in any form for personal services which will result in such person's receiving a total compensation for his personal services from such sources exceeding in amount or value Twenty-five Thousand Dollars ($25,000.00) per annum.

[fol. 41] 21. *Employment of Member of Congress.* The Managing Agent agrees not to employ any Member of Congress either with or without compensation, as an attorney, agent, officer, or director of such person.

22. *Sale, Transfer or Assignment.* Without the written consent of the Owner, the Managing Agent shall not sell, assign or transfer either directly or indirectly or through any reorganization, merger or consolidation, this agreement or any interest therein nor shall any agreement or arrangement be made by the Managing Agent whereby the maintenance, management or operation of the aforesaid service, route, line or vessels is to be performed by any other person, whether as Managing Agent or otherwise.

23. *Agents of Managing Agent.* Any agents selected or appointed by the Managing Agent shall be solely the agents

of said Managing Agent and not, in any respect, the agents of the Owner. The Managing Agent shall be responsible to the Owner for any action taken by any of said agents. Such agents shall, however, be subjected to disapproval by the Owner and any agency agreement shall be terminated by the Managing Agent if the Owner shall so request. Any compensation payable by the Managing Agent for services rendered in connection with the Owner's vessels shall be subject to aproval by the Owner.

24. *Foreign-Flag Vessels.* Without the express written consent of the Owner, neither the Managing Agent nor any holding company, subsidiary, affiliate, or associate of the Managing Agent, nor any officer, director, agent, or executive thereof, shall, directly or indirectly, own, charter, act as agent or broker for, or operate any foreign flag vessel which competes with any American flag vessel service which may be determined by the Owner to be essential.

[fol. 42] 25. *Termination upon Default.* The Owner may terminate this agreement by written or telegraphic notice to the Managing Agent in case of the occurrence of any of the following events of default:

(a) A voluntary sale by the Managing Agent of this agreement, or any interest therein, or any assignment, transfer, agreement or arrangement whereby the management or operation of the above described Line or vessels shall be divested from the Managing Agent, unless the prior written consent of the Owner is obtained.

(b) The filing of a petition in bankruptcy, or for reorganization under Section 77-B of the Bankruptcy Act, by the Managing Agent or the entry of an order, upon petition against the Managing Agent, adjudicating the Managing Agent a bankrupt, or approving the filing of such petition under said Section 77-B, or the appointment of a receiver or receivers of the Managing Agent or any substantial part of its property, or the making of a general assignment by the Managing Agent for the benefit of creditors.

(c) Any breach by the Managing Agent of its obligations under this agreement or any agreement which may be executed in connection herewith.

(d) Failure by the Managing Agent to comply with any applicable provisions of the Merchant Marine Act, 1936, or any law relating to the operation of the foregoing vessels.

26. *Cancellation or Modification by Mutual Consent.* This agreement may be terminated, modified or amended at any time by mutual consent.

[fol. 43] 27. *Liquidation of Business.* In case of termination of this agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in the possession or control of the Managing Agent by reason of this agreement, shall be immediately turned over to the Owner, at times and places to be fixed by the Owner, and the Owner may collect directly, or by such agent or agents as it may appoint, all freight moneys or other debts remaining unpaid, provided, however, the Managing Agent shall, if required by the Owner, adjust, settle and liquidate the current business of the vessels.

Nothwithstanding the foregoing provisions, however, except in the event of default, when the Owner shall otherwise direct, the Managing Agent may complete hereunder voyages commenced prior to the date as of which the agreement shall be termimated.

28. *Determination by Commission.* Any question arising under this agreement shall be referred to the United States Maritime Commission for determination, and its decision shall be final.

In Witness Whereof, the parties hereto have executed this agreement in duplicate the day and year first above written.

United States Maritime Commission, by Joseph P. Kennedy, Chairman. (Seal) Attest: W. C. Peet, Jr., Secretary.

Roosevelt Steamship Company, Inc., by John M. Franklin, Vice President. (Seal) Attest: A. P. Palmer, Secretary.

[fol. 44] In United States District Court

Affidavit of August P. Klein in Opposition to Motion

State of New York,
County of New York, ss:

August P. Klein, being duly sworn, deposes and says:

1. That I am a member of the firm of Klein Kinsley & Klein, attorneys for the plaintiff in the above-entitled

action and that I am fully acquainted with all the steps and proceedings had herein.

2. The present motion, made on the eve of trial, is to dismiss the complaint on the ground that the Court has no jurisdiction of the subject matter of the action. More specifically it is contended that the present suit should have been brought pursuant to the Suits in Admiralty Act, against the United States of America.

3. The action is to recover damages for the wrongful death of the plaintiff's intestate. On July 9th, 1938, plaintiff's intestate, a custom's guard was climbing a ladder thrown over the side of the steamship Unicoi in order to board the ship. The ladder broke, intestate fell and sustained injuries, as a result of which he eventually died. This action was brought against the defendant, Roosevelt Steamship Company, Inc., as the party managing and operating the boat and its appurtenances, the negligence predicated against it is upon the theory that it, its serv-[fol. 45] ants, agents and employees, threw a ladder, which it knew or should have known was defective and dangerous, over the side of the ship for use by the plaintiff's intestate.

4. The defendant as part of its moving papers submits the affidavit of William E. Collins, Counsel to the United States Maritime Commission for the North Atlantic District, and Special Assistant to the United States Attorney for the Southern District of New York. On the last page of the affidavit of Mr. Collins the Court is referred to various cases taken from the files of his office. An examination of these cases indicates that they were all decided in the year 1930.

5. No reference is made and the Court's attention is not called to the very recent case of:

> *Quinn* v. *Southgate Nelson Corporation*, United States District Court, Southern District of New York, Civ. 5-260, decided January 16, 1941,

with an opinion by Moscowitz, D. J., which I believe is on all fours with the present case. I am informed that this case is now on appeal.

6. The agreement under which the Southgate Nelson Corporation was operating was similar to the agreement under

which the present defendant, Roosevelt Steamship Company, Inc., was operating. I take the liberty of quoting from the opinion in the *Quinn* case as follows:

"Under these circumstances, the defendant bases its asserted non-liability upon the contention that the operating agreement and practice thereunder were such as to make [fol. 46] the master of the Waukegan, its officers and crew, the agents of the United States Maritime Commission, a governmental agency, and not of the defendant, Southgate Nelson Corporation. The defendant claims therefore, that any acts of negligence are not to be ascribed to it, but to the United States Maritime Commission.

The operating agreement between the United States Maritime Commission and Southgate Nelson Corporation under which the Waukegan, among other vessels, was operated, designated the latter as managing agent 'to manage, operate, and conduct the business of the Line * * *.' The managing agent was 'to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe. * * *.' Paragraph 7 of the agreement provided in part as follows: 'The licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such employees if it shall have reason to be dissatisfied.'

It thus appears that actual choice of the ship's personnel was in the hands of the defendant although the owner retained a veto power with respect thereto. Actual operation rested with the defendant although the owner retained the right to issue restrictions. Under such circumstances, it is difficult to see how the defendant can claim complete freedom of responsibility for the acts of the ship's master whom it selected. Granting that the owner reserved a veto power over the actions of the defendant, yet the initial selection of the Waukegan's officers rested with the defendant and immediate supervision rested with it. It was not clothed with the sovereign immunity of the owners since [fol. 47] as is well established, 'the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.' See *Keifer & Deifer* v. *R. F. C.*, 306 U. S. 381, 388; see also, *Sloan Shipyards Corp.* v. *United States S. Bd.*

E. F. Corp., 258 U. S. 549, 567, 568. The defendant had the full power to control the actions of the master. With that went responsibility for his acts.

Aside from the foregoing, however, the agreement between the owner and the defendant placed upon the defendant responsibility for the conduct of the agents chosen by it. Thus paragraph 23 of the agreement provided as follows: 'Any agents selected or appointed by the Managing Agent shall be solely the agents of said Managing Agent and not, in any respect, the agents of the Owner. The Managing Agent shall be responsible to the Owner for any action taken by any of said agents. Such agents shall, however, be subject to disapproval by the Owner and any agency agreement shall be terminated by the Managing Agent if the Owner shall so request. Any compensation payable by the Managing Agent for services rendered in connection with the Owner's vessels shall be subject to approval by the Owner.' It is likewise significant to note in passing, although by no means determinative, that Paragraph 14 of the agreement required the defendant to provide protection and indemnity insurance, which might indicate that the parties themselves viewed the defendant as being the responsible party.

Since the master was the subagent of the defendant, responsibility for the negligent operation of the vessel must rest upon it. As stated in the Restatement of the Law of [fol. 48] Agency, Paragraph 362, 'An agent is liable to third persons for the conduct of subagents and of his servants under the same conditions which make a principal liable for the conduct of an agent or servant.' "

7. In the present case it is conceded that the physical operation and possession of the boat and its appurtenances were at the time of the accident in the defendant. At the bottom of page 2, of the Examination before Trial, a copy of which is annexed to the moving papers, the following testimony appears:

"Q. Did the defendant operate the boat?

A. Yes.

Q. Did the defendant operate the boat on July 9, 1938, and prior thereto?

A. Yes."

8. The contract provided for the operation and control of the boat by the defendant. Paragraph 7, reads in part as follows:

"The Managing Agent (the defendant herein) agrees to man, equip, victual, supply and operate the vessels." • • •

Paragraph 11, reads in part as follows:

"The Managing Agent (the defendant herein) shall, subject to regulations or methods of supervision and inspection as may be required or prescribed by the Owner, exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment and spare parts, and will effect maintenance and voyage repairs and replacements." • • •

[fol. 49] Paragraph 14, provides in part as follows:

"The Managing Agent (the defendant herein) shall provide, for the account of the Owner and subject to its approval, Protection and Indemnity, and such other forms of insurance as the Owner may deem necessary."

9. By the terms of the contract the defendant was specifically charged with the obligation of properly operating and maintaining the boat and its appurtenances, and therefore it is apparent that both by the terms of the contract and from the physical facts the operation of the boat was in the hands of the defendant.

10. In causing a ladder to be lowered over the side of its boat for the use of the plaintiff's intestate, which ladder, it knew or should have known was defective, the defendant committed an affirmative act of negligence. It is familiar law that a person who commits an act of negligence is personally responsible for the consequences thereof, regardless of whether the act was done on behalf of a principal or whether it was done on behalf of himself. He is an active tort feasor and is liable for his misfeasance. See:

Mollino v. *Ogden & Clarkson Corp.*, 243 N. Y. 450, and cases cited therein;

Mechem Agency, Volume One, Second Edition, Section 1474;

New York and Cuba Mail Steamship Company v. *United States*, 12 Fed. 2nd, 348;
Blumenthal v. *United States*, 30 Fed. 2nd, at page 248;
Sloane's Shipyard's Case, 258 U. S. 549.

[fol. 50] 11. The Suits in Admiralty Act was passed primarily to protect the government and it prohibited the libeling of government owned property. The accepted test on the question of jurisdiction as laid down in the case of *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, is that "Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States." See

Shea v. *Export Steamship Corporation*, 253 N. Y. 17.

In the present case the government is not sued and if we are successful the government will not directly or mediately pay out any money for two reasons:

(a) An employee or agent who commits an affirmative tort cannot collect from his master or principal. See 3 C. J. S. Agency, Section 220.

(b) The management agreement under which the defendant Roosevelt Steamship Company, Inc., was operating, specifically provided for liability insurance, see Paragraph 14, and for an $80,000.00 bond conditional upon the due and faithful performance of all and singular covenants and agreements of the Managing Agent (the defendant herein), contained in the agreement, see Paragraph 18.

12. In connection with the provision for the bond, two of the pertinent paragraphs of the agreement are Section 8, in which it agrees to conduct its operations in full compliance with the applicable provisions of law and to exercise due diligence to protect and safeguard the interests of the Owner in all respects; and Paragraph 11, in which it agrees to exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, cover-[fol. 51] ing hull, machinery, boilers, tackle, apparel, furni-

ture, equipment, and spare parts, and will effect maintenance and voyage repairs and replacements.

13. In the case of

Odgaard v. *Cosmopolitan Shipping Co., Inc.*, 171 Misc. 244,

the United States Attorney appeared specially and made a motion to dismiss the complaint. The vessel was operated by the defendant Cosmopolitan Shipping Co., Inc., as agent for the United States. It was named as a defendant together with the America France Line, a trade name owned by the United States. It does not appear that service was ever made upon the government and the Court treated the matter as if there was only one defendant in the case. The defendant claimed that jurisdiction of the action was exclusively in the United States District Court and relied upon the Suits in Admiralty Act. The Court had the following to say at the bottom of page 245, and top of page 246:

"The question presented here is whether that statute is controlling of this action. It appears the purpose of the act is to provide a remedy against the United States for damage done by vessels owned by it which are employed in merchant service. Among the provisions of the act are those for payment of judgments recovered from the Treasury of the United States.

In the instant case plaintiff is seeking neither recovery from the United States nor satisfaction of any judgment obtained out of a vessel owned by the United States or from the cargo of such a vessel. If he were the remedy would be controlled by the Suits in Admiralty Act. (*Fleet Corpora-*
[fol. 52] *tion* v. *Rosenberg Bros.*, 276 U. S. 202). However, the limitation of the act would seem to be only applicable to instances where the money required to pay the judgment against the defendant would come directly or indirectly from the United States Treasury, or in other words where the United States is the real party affected by the action. (*Johnson* v. *Fleet Corporation*, 280 U. S. 320). It does not appear that the liability sought to be placed upon this defendant would be directly or indirectly the liability of the United States. The defendant is sued as the agent responsible for the injury suffered by the plaintiff. While the plaintiff might have elected to include the United States as a defendant, he did not do so, and there does not appear

to be any way in which the defendant sued could make its liability that of the government. Under those circumstances the case differs from no other under the Jones Act, and that being so the plaintiff may sue in the State court if he so desires. (*Panamana R. R. Co.* v. *Vasquez*, 271 U. S. 557, affg. 239 N. Y. 590)."

14. It is therefore respectfully submitted that the motion herein should be denied.

(Signed) August P. Klein.

Sworn to before me this 6th day of May, 1941. Earle E. Lightbourne, Commissioner of Deeds, New York City.

[fol. 53] In United States District Court

Appearances:

Klein, Kinsley & Klein, Esqs., Attorneys for Plaintiff; August P. Klein, Esq., of Counsel.

Kirlin, Campbell, Hickox, Keating & McGrann, Esqs., Attorneys for Defendant; Raymond Parmer, Esq., of Counsel.

Opinion on Motion to Dismiss—May 21, 1941

Mandelbaum, D. J.:

The defendant moves to dismiss the complaint for lack of jurisdiction over the subject matter of the action.

The plaintiff, as administratrix of the deceased claims that his death was caused by a defective ladder and accordingly charges the defendant with negligence.

The defendant says that the United States of America is the real party in interest; that it owns and controls the vessel, pursuant to an operating agreement between the Maritime Commission and Roosevelt Steamship Company, Inc.; that the United States of America must ultimately pay the judgment if there be a recovery.

It is therefore the defendant's position that the action is improperly brought since a remedy to the plaintiff is available under the Suit in Admiralty Act. In opposing the motion, plaintiff relies chiefly on the case of *Quinn* v. *South-*

[fol. 54] *gate Nelson Corp.*, decided by Judge Moscowitz, sitting in this district on January 16th, 1941, Civ. 5-260. A claim similar to the one now raised by the defendant was rejected by the court. I have been advised that an appeal from that decision is now pending in the Circuit Court of Appeals. While the question is not free from doubt, I shall presently follow the decision in the *Quinn* case and sustain jurisdiction. I recommend that it is for the best interests of both parties that the trial be adjourned until the appeal of the *Quinn* case is decided. I can see no prejudice to any one. Should the question at issue be decided adversely to the plaintiff, the defendant may then move for reargument, or such other relief as may be advisable.

Samuel Mandelbaum, U. S. D. J.

Dated, May 21st, 1941.

[fol. 55] In United States District Court

Notice of Motion for Reargument of Motion to Dismiss

Sirs:

Please Take Notice that upon the annexed affidavit of Raymond Parmer, sworn to June 6, 1941, the undersigned will move this Court in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 17th day of June, 1941, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for the reargument of its motion to dismiss the complaint made on the ground that the Court has not jurisdiction of the subject matter of the action, which was heretofore brought on by notice of motion dated April 29, 1941, and for such other and further relief as is just in the premises.

Dated, New York, June 9, 1941.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Office and Post Office Address: 120 Broadway, Borough of Manhattan, City of New York.

To: Klein, Kinsley & Klein, Esqs., Attorneys for Plaintiff, 342 Madison Avenue, New York, N. Y.

[fol. 56] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RAYMOND PARMER IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss.:

Raymond Parmer, being duly sworn, says:

I am an attorney at law and a member of the firm of Kirlin, Campbell, Hickox, Keating & McGrann, attorneys for the defendant, and I am familiar with the pleadings and proceedings heretofore had herein.

Defendant, Roosevelt Steamship Company, Inc., now moves for a reargument of its motion to dismiss this action on the ground that the court has not jurisdiction of the subject matter thereof.

The motion to dismiss on the above ground came on before Judge Mandelbaum on May 1, 1941, and was denied by him in an opinion dated May 21, 1941, a copy of which is annexed hereto.

The reason for moving to reargue is that it is believed that the court has overlooked an important matter, and that this matter should be called to the court's attention more pointedly than was done on the original argument.

Apparently the sole reason for denying the motion was a reliance by the court on the case of *Quinn* v. *Southgate Nelson Corporation*, decided by Judge Moscowitz, sitting in the Southern District, on January 16, 1941.

If the *Quinn* case involved the same point as is involved in the case at bar, there would be no prejudice, as Judge [fol. 57] Mandelbaum points out, in awaiting the decision of the Circuit Court of Appeals, on the appeal from Judge Moscowitz's decision in the *Quinn* case. If that were the case, the defendant, Roosevelt Steamship Company, Inc., would be content to wait, and would not now be making this motion to reargue.

However, the *Quinn* case does not involve the point which Roosevelt Steamship Company, Inc. has raised on this motion, and because of that it is apparent that the decision of the Circuit Court of Appeals will not dispose of the question raised in the present motion.

The *Quinn* case does involve a point which is available to Roosevelt Steamship Company, Inc. in the present case. But that point was not raised by the Roosevelt Steamship

Company, Inc. on the present motion. The only point raised by Roosevelt Steamship Company, Inc. was a point with respect to jurisdiction of the subject matter. In the *Quinn* case that point was not raised. It could not be raised because the tort was one occurring on land.

Defendant, Roosevelt Steamship Company, Inc., has two legal points on which it may defend. The first is that as an agent of the United States it did not own, operate nor control the vessel on which the accident occurred, and did not employ the crew. That is a point which can be raised properly on a trial. It is an issue in the case, having been raised by complaint and answer. The decision of Judge Moscowitz in the *Quinn* case, if correct, decides that point against the contention of the defendant, Roosevelt Steamship Company, Inc. In view of the fact that the question will eventually be decided by the Circuit Court of Appeals, there is no disposition on the part of the defendant herein to insist on a decision in the District Court contrary to that in the *Quinn* case. Indeed, the defendant, Roosevelt Steamship Company, Inc., has not raised this question in the [fol. 58] District Court as yet. It intended to reserve it for the trial or for such time as the Circuit Court of Appeals would have decided it.

The point which the defendant herein has raised before this court is one having to do with jurisdiction. For the purpose of this motion it may be assumed that the defendant, Roosevelt Steamship Company, Inc., operated and controlled the vessel on which the accident happened and employed the crew, and that because of this it may be held liable to the plaintiff for negligence.

Nevertheless, it appears, without contradiction, that the money with which to pay any judgment which may be rendered herein will come from the United States Treasury. Therefore, under the law, the plaintiff is required to bring his suit against the United States of America under the Suits in Admiralty Act. In other words, the United States of America makes itself *suable and liable*, and requires that it be substituted as defendant for the "real defendant," and that the suit be brought in Admiralty.

The Suits in Admiralty Act does not provide merely that suits for marine "torts" when *committed by the United States* must be brought in Admiralty. It provides that suits for marine torts where the United States must eventually pay the bill, even though it did not commit the tort,

must be brought in Admiralty; and then against the United States as if the United States were the tort feasor.

The Supreme Court, in the case of *Johnson* v. *United States Shipping Board* and *United States Shipping Board* v. *Lustgarten*, 280 U. S. 320, at pages 326 and 327, makes all of the above clear.

At page 327 the court said:

"The analysis of the Act and the reasons on which rests our decision in *Fleet Corporation* v. *Rosenberg Bros.* apply here. Putting the United States and the Fleet Corpora- [fol. 59] tion on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation *or other agents* for enforcement of the maritime causes of action covered by the Act. Such a failure of purpose on the part of the Congress is not readily to be inferred. We conclude that the remedies given by the Act are exclusive in all cases where a libel might be filed under it."

It is to be noted that the Supreme Court specifically referred to suits against "other agents" of the United States. The case before it was one in which there was involved a private corporation which had been acting as an agent for the United States. For the purposes of its decision it was assumed that the agent might be liable, and for that reason it was held that the suit must be brought against the United States in Admiralty.

Obviously, if the agent could not be liable (because it did not control the vessel and did not employ the men) no judgment could be obtained against it and no funds to pay it would come from the United States Treasury. However, because the court assumed that the agent, notwithstanding its agency, might still be liable, it dismissed the action on jurisdictional grounds. The core of the decision was that in such cases the United States has consented to be sued on certain terms as a complete substitute for suits against it or its agent in other courts and on other terms.

Therefore, if the Circuit Court of Appeals should hold in the *Quinn* case that the contract between the United States and its agents leaves the agents in control, makes the agents

the employers of the crews, and therefore makes the agents [fol. 60] legally responsible for personal injuries occurring to persons coming on board Government vessels, there would still be the question which the defendant here has endeavored to raise by motion to dismiss. The decision of the Circuit Court of Appeals would not determine the question which the present defendant has raised. On the other hand, it would make it more pointed, for then the question would be whether the liability, if any, of the agent of the United States should be determined at law or in Admiralty by a suit against the United States under the Suits in Admiralty Act. There really is no question with regard to this. It has already been determined by the Supreme Court in favor of the defendant.

Already the defendant has offered the highest form of proof that the money to pay any judgment rendered against the defendant will come eventually from the United States Treasury. A representative of the United States says so.

The Circuit Court of Appeals for this circuit has said the same thing in *Admiral Oriental Lines* v. *United States*, 86 F. (2d) 201.

If the court needs further evidence of the obligation of the United States to pay such a judgment and its recognition of its obligation, it can and will be submitted. However, in view of the present failure on the part of the plaintiff to contradict the statements already made, the present showing should be sufficient.

By reason of the above, the defendant asks for a rehearing and on the rehearing the granting of the motion to dismiss on account of the absence of jurisdiction of the subject matter. It does this primarily because it wishes to call the court's attention to the fact that the decision of the Circuit Court of Appeals in the *Quinn* case will not necessarily be determinative of the motion made herein, and be- [fol. 61] cause it would not be proper to have this present motion, which relates to jurisdiction, depend on the *Quinn* case, in which the sole matter involved is that of the control and operation of a Government vessel.

Of course, if the Circuit Court of Appeals should hold that the private corporations acting as agents for the United States in the operation of Government vessels do not employ the crews, do not control and operate the vessels and are not responsible for torts, then there will not be any necessity for deciding the present motion relating to

jurisdiction. The defendant will not be liable in the first place, and cannot be held liable in any court. Under such circumstances it will not be necessary to decide that the defendant's liability must be ascertained by proceedings in a particular court.

On the other hand, if the Circuit Court of Appeals should hold that such Government agents are liable for such torts, then the present question—relating to jurisdiction—is presented pointedly for decision. There is no reason why it cannot be decided in advance of the Circuit Court of Appeals' decision, by assuming that the decision of the Circuit Court of Appeals will be contrary to the contentions of the defendant in the *Quinn* case and the defendant herein.

Raymond Parmer.

Sworn to before me this 6th day of June, 1941. Andrew J. Doyle, Notary Public, Queens County.

[fol. 62] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF AUGUST P. KLEIN IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York, ss:

AUGUST P. KLEIN, being duly sworn, deposes and says:

1. That I am a member of the firm of Klein, Kinsley & Klein, the attorneys for the plaintiff in the above-entitled action and that I am fully acquainted with all the steps and proceedings had herein.

2. The present motion is a motion by the defendant for a reargument on the ground that the defendant believes that the Court overlooked an important matter, in that the case of *Quinn* v. *Southgate Nelson Corp.*, decided by Judge Moscowitz, sitting in this district on January 16th, 1941, Civ.-5-260, cited by the Court, is not in point and does not cover the issue raised concerning the jurisdiction of the subject matter.

3. This is not true, for the case is on all fours with the present case. Robert Clyde Quinn, like the deceased, James P. Brady, in the present case, was an employee of the United States government. At the bottom of page 3, and

top of page 4, of the Brief for Plaintiff-Appellee, in the *Quinn* case, the following appears:

[fol. 63] "As her husband had been a civil employee of the United States, all rights which the widow of Quinn might have against the owner of the vessel, the United States, would be under the Federal Employees' Compensation Act, and that is why no action for indemnity was brought against the United States. It was not legally possible to maintain such an action.

However, the Southgate Nelson Corporation, a private corporation, as an independent contractor and managing agent, being in actual possession and charge of the vessel, and the officers thereof being subject to its control and direction, was liable for its own negligent acts and, consequently, the widow of Robert Clyde Quinn brought a civil action for damages against the Southgate Nelson Corporation.

The fact that the salaries of the ship's officers may have been paid by the United States, or that the United States, through the Maritime Commission, reserved supervision not only over the ship's officers, but also over the shipping routes, would in no way change the legal liability of the agent for its own negligence, or for the negligence of the ship's officers, under its control.

Even though the United States of America may be immune from suits, nevertheless such immunity is not inherited by a private corporation serving as agent of the Government in the prosecution of a commercial enterprise in which the Government may be engaged.

Kiefer & Kiefer v. *Reconstruction Finance Corporation*, 306 U. S. 381."

4. The Defendant-Appellant in its Brief in the *Quinn* case, at page 23, has the following to say:

[fol. 64] "The responsibility of the United States for damages caused by the negligence of officers and crews of vessels operated for its account is recognized in the Suits in Admiralty Act, 46 U. S. Code (annot.) 741, 752. In *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, 326, 74 L. Ed. 451, 457, the Supreme Court dealt with a number of cases involving claims arising out of the operation of Shipping Board vessels. Both cargo and personal injury claims were involved.

The Court held that the remedy provided by the Suits in Admiralty Act was exclusive as against the United States, the Fleet Corporation and the Managing Operators saying:

'On the facts above stated it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions.' "

5. In answer to that argument the Plaintiff-Appellee, on page 13, of its Brief in the *Quinn* case replied as follows:

"The suggestion by appellant that the Suits in Admiralty Act is applicable to this case is utterly without foundation. The decedent, Robert Clyde Quinn, was a civil employee of the United States, and the exclusive remedy is under the United States Employees' Compensation Act. We sued a third party at common law, for its own negligence, and [fol. 65] any recovery had against such third party will not be paid by the United States, but would be paid by the insurance company which issued the liability policy covering this vessel."

6. In my answering affidavit to the original motion to dismiss, I answered the contentions of the defendant as follows:

The Suits in Admiralty Act was passed primarily to protect the government and it prohibited the libeling of government owned property. The accepted test on the question of jurisdiction as laid down in the case of *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, is that "Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States." See

Shea v. *Export Steamship Corporation*, 253 N. Y. 17.

In the present case the government is not sued and if we are successful the government will not directly or mediately pay out any money for two reasons:

(a) An employee or agent who commits an affirmative tort cannot collect from his master or principal. See 3 C. J. S. Agency, Section 220.

(b) The management agreement under which the defendant Roosevelt Steamship Company, Inc., was operating, specifically provided for liability insurance, see Paragraph 14, and for an $80,000.00 bond conditional upon the due and faithful performance of all and singular covenants [fol. 66] and agreements of the Managing Agent (the defendant herein), contained in the agreement, see Paragraph 18.

In connection with the provision for the bond, two of the pertinent paragraphs of the agreement are Section 8, in which it agrees to conduct its operations in full compliance with the applicable provisions of law and to exercise due diligence to protect and safeguard the interests of the Owner in all respects; and Paragraph 11, in which it agrees to exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and will effect maintenance and voyage repairs and replacements.

In the case of *Odgaard* v. *Cosmopolitan Shipping Co., Inc.*, 171 Misc. 244, the United States Attorney appeared specially and made a motion to dismiss the complaint. The vessel was operated by the defendant Cosmopolitan Shipping Co., Inc., as agent for the United States. It was named as a defendant together with the America France Line, a trade name owned by the United States. It does not appear that service was ever made upon the government and the Court treated the matter as if there was only one defendant in the case. The defendant claimed that jurisdiction of the action was exclusively in the United States District Court and relied upon the Suits in Admiralty Act. The Court had the following to say at the bottom of page 245, and top of page 246:

"The question presented here is whether that statute is controlling of this action. It appears the purpose of the [fol. 67] act is to provide a remedy against the United States for damage done by vessels owned by it which are employed in merchant service. Among the provisions of the act are those for payment of judgments recovered from the Treasury of the United States.

In the instant case plaintiff is seeking neither recovery from the United States nor satisfaction of any judgment

obtained out of a vessel owned by the United States or from the cargo of such a vessel. If he were the remedy would be controlled by the Suits in Admiralty Act. (*Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202.) However, the limitation of the act would seem to be only applicable to instances where the money required to pay the judgment against the defendant would come directly or indirectly from the United States Treasury, or in other words where the United States is the real party affected by the action. (*Johnson* v. *Fleet Corporation*, 280 U. S. 320.) It does not appear that the liability sought to be placed upon this defendant would be directly or indirectly the liability of the United States. The defendant is sued as the agent responsible for the injury suffered by the plaintiff. While the plaintiff might have elected to include the United States as a defendant, he did not do so, and there does not appear to be any way in which the defendant sued could make its liability that of the government. Under those circumstances the case differs from no other under the Jones Act, and that being so the plaintiff may sue in the State court if he so desires. (*Panama R. R. Co.* v. *Vasquez*, 271 U. S. 557, affg. 239 N. Y. 590.")

7. Incidentally the appeal in the *Quinn* v. *Southgate Nelson Corporation* case, was argued on June 12th, 1941, and [fol. 68] a decision, which no doubt will dispose of the issue now raised, should be forthcoming in very short order.

Wherefore, I respectfully request that the defendant's motion for a reargument be denied.

August P. Klein.

Sworn to before me this 16th day of June, 1941.
Earle R. Lightbourne, Commissioner of Deeds, New York City.

In United States District Court

Present: Hon. Samuel Mandelbaum, U. S. D. J.

Order Denying Motion for Reargument—July 3, 1941

The defendant having moved upon a Notice of Motion, dated June 9th, 1941, for a reargument of its motion to dismiss the complaint made on the ground that the Court

has not jurisdiction of the subject matter of the action, and the said motion duly coming on to be heard on the 17th day of June, 1941,

[fol. 69] Now, upon reading and filing the said Notice of Motion, dated June 9th, 1941, the affidavit of Raymond Parmer, duly sworn to June 6th, 1941, and the opinion of Hon. Samuel Mandelbaum, U. S. D. J., dated May 21st, 1941, all of which were read and submitted by the defendant in support of said motion, and on reading and filing the affidavit of August P. Klein, duly sworn to June 16th, 1941, which was read and submitted by the plaintiff in opposition thereto, and after hearing Raymond Parmer, Esq., of counsel for the defendant in support of said motion, and August P. Klein, Esq., of counsel for the plaintiff in opposition thereto, due deliberation having been had, it is on motion of Klein, Kinsley & Klein, attorneys for the plaintiff,

Ordered, that the said motion for a reargument be and the same hereby is in all respects denied.

Samuel Mandelbaum, U. S. D. J.

July 3, 1941.

In United States District Court.

Present: Hon. Samuel Mandelbaum, U. S. D. J.

Order Denying Motion to Dismiss Complaint—July 3, 1941

The defendant having moved upon a Notice of Motion, dated April 29th, 1941, for an order dismissing the com- [fol. 70] plaint herein, on the ground that the court has not jurisdiction of the subject matter of the action, and the said motion duly coming on to be heard on the 6th day of May, 1941,

Now, upon reading and filing the said Notice of Motion, dated April 29th, 1941, the affidavit of Raymond Parmer, duly sworn to April 30th, 1941, the affidavit of William E. Collins, duly sworn to May 1st, 1941, the examination of Andrew F. Finch, sworn to October 8th, 1940, and on the written contract made between the defendant and the United States Maritime Commission on June 28th, 1937, all of which were read and submitted by the defendant in support of said motion, and on reading and filing the affidavit of August P. Klein, duly sworn to May 6th, 1941, which was

read and submitted by the plaintiff in opposition thereto, and after hearing Raymond Parmer, Esq., of counsel for the defendant in support of said motion, and August P. Klein, Esq., of counsel for the plaintiff in opposition thereto, due deliberation having been had, and upon reading and filing the opinion of the Court, dated May 21st, 1941, it is on motion of Klein, Kinsley & Klein, attorneys for the plaintiff,

Ordered, that the said motion be and the same hereby is in all respects denied.

Samuel Mandelbaum, U. S. D. J.

July 3, 1941.

[fol. 71] In United States District Court

Statement of Evidence.

Before Hon. Alfred C. Coxe, District Judge, and a Jury

New York, October 20, 1941;
10:30 o'clock, a. m.

Appearances:

Klein, Kinsley & Klein, Esqrs., Attorneys for the Plaintiff; Harry A. Gair, Esq., of Counsel.

Kirlin, Campbell, Hickox, Keating & McGrann, Esqrs., Attorneys for the Defendant; Raymond Parmer, Esq., of Counsel.

Mr. Parmer: Your Honor, I think it is fitting that I should mention at this time that one of the points in the case which I shall raise when your Honor thinks it is proper to raise it is the matter of the jurisdiction of the Court—jurisdiction of the subject matter.

The Court: I will be guided by the Circuit Court of Appeals.

(A jury was duly impaneled, examined and sworn.)

(Mr. Gair opened to the jury on behalf of plaintiff.)

(Mr. Parmer opened to the jury on behalf of defendant.)

[fol. 72] Mr. Gair: I offer in evidence the letters of administration issued to Mrs. Brady, plaintiff in this case.

Mr. Parmer: No objection.

(Marked Plaintiff's Exhibit 1.)

Mr. Gair: I am going to read part of the examination before trial. I am not going to read all, but I will read such of it as I deem material to the plaintiff's case, and I think you may want to follow it and see what portion you want to read yourself. I have a photostatic copy of the contract; have you the original?

Mr. Parmer: No, but I will consent to a photostatic copy. However, in order to preserve the continuity of the examination, I would want to read all testimony that you don't read.

Mr. Gair: I think I will read straight down to a certain point, and the rest I will leave entirely to your side.

Mr. Parmer: Very good.

Mr. Gair: May I state to the jury just what I am doing now. I am reading now from a deposition taken in advance of trial of one of the officers of Roosevelt Steamship Company, deposition of Andrew F. Finch, assistant comptroller of the defendant Roosevelt Steamship Company, pursuant to oral stipulation, returnable and held on September 17, 1940, at 11 a. m., at the office of Kirlin, Campbell, Hickox, Keating & McGrann, 120 Broadway, New York City. Appearances: Charles Kramer, of counsel for plaintiff, Raymond Parmer, of counsel for the defendant, and Andrew F. Finch in person.

DEPOSITION OF ANDREW F. FINCH

"Q. Mr. Finch, what is your full name?

"A. Andrew F. Finch.

"Q. Where do you reside?

"A. 721 49th Street, Brooklyn, New York.

"Q. In what capacity are you connected with the defendant?

"A. Assistant Comptroller.

[fol. 73] "Q. For how many years have you been the assistant comptroller?

"A. Since 1936; prior to that time, from 1925 to 1936, treasurer.

"Q. As assistant comptroller, generally what are your duties?

"A. To do with all the financial matters connected with the firm.

"Q. Are you familiar with the steamship Unicoi?

"A. Yes.

"Q. What type of a ship was it?

"A. It was a motor ship, freight carrying vessel.

"Q. Approximately how many tons was it, do you know?

"A. Around 9,000 tons dead weight. 9,000 deadweight tons.

"Q. Do you know how long the boat was?

"A. About 400 feet, I should say.

"Q. What type of cargo did it carry?

"A. Various types; general cargo, all types.

"Q. Was it an ocean-going boat?

"A. Yes.

"Q. Did it carry passengers?

"A. The Unicoi, I believe, had accommodations for 12 passengers.

"Q. On or about July 9, 1938, the day of the accident to James P. Brady, how large was its crew?

"A. The crew was 35 to 36 in number at all times.

"Q. That includes the captain and all the sailors and seamen?

"A. Yes.

"Q. Did the boat have any particular points where it would travel to and from?

"A. Yes; it was scheduled to North Atlantic ports, proceeding to ports in India and return to United States ports.

"Q. Who owned the boat?

"A. The United States Maritime Commission.

"Q. What year did the United States Maritime Commission own the boat?

"A. I don't know exactly what year.

"Q. Approximately.

"A. Around 1920.

"Q. Who owned the boat before?

"A. I don't know.

[fol. 74] "Q. Was that the year the boat was built?

"A. I am pretty sure it was around that time the boat was built.

"Q. Did the defendant operate the boat?

"A. Yes.

"Q. Did the defendant operate the boat on July 9, 1938, and prior thereto?

"A. Yes.

"Q. Was a contract entered into between the United States Maritime Commission and the defendant with reference to the operation of the boat?

"A. Yes.

"Q. Is that a written contract?

"A. Yes."

Mr. Gair: I offer in evidence the contract referred to in the examination.

(Marked Plaintiff's Exhibit 2.)

Mr. Gair: That is all I will read from the examination before trial. Do you want to read anything further from the examination?

Mr. Parmer: I am just looking now. I will continue:

"Q. How long does this contract run?

"A. It was for six months originally, and had been extended from time to time.

"Q. And was the contract in operation on July 9, 1938?

"A. Yes."

And then we will skip down to the bottom of the next page:

"Q. Did the defendant hire the captain of the steamship Unicoi?

"A. The captain was recommended to the Maritime Commission by the defendant.

"Q. Was he accepted?

"A. Yes."

Then the top of the next page:

"Q. Did the defendant also hire the other officers of the steamship Unicoi on or prior to July 9, 1938?

"A. The other officers of the Unicoi were also recommended to the Maritime Commission for approval.

"Q. And were they approved?

"A. Yes.

[fol. 75] "Q. How long had Captain Dixon been the captain of the steamship Unicoi prior to July 9, 1938?

"A. I cannot state offhand, without looking up the record.

"Q. Did the defendant hire the rest of the crew aside from the officers of the steamship Unicoi on or prior to July 9, 1938?

"A. No.
"Q. Did they recommend the employees?
"A. No.
"Q. Who hired them?
"A. The Maritime Commission.
"Q. Did the defendant approve the selection by the Maritime Commission of the crew?
"A. We had nothing to say in the matter."

Mr. Parmer: That is all.

Mr. Gair: I will just read one section of the contract, Section 11, the section about repairs and maintenance (reading to jury).

MARGARET M. BRADY, the plaintiff, called as a witness in her own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Gair:

Q. Mrs. Brady, you were the wife of James Brady at the time of his death?
A. Yes.
Q. Where did you live at that time?
A. Yonkers; 41 Devoe Avenue, Yonkers.
Q. Who was the family—whom did the family consist of at that time besides yourself and husband?
A. My daughter and my son.
Q. Will you give us the daughter's name, please?
A. Virginia Brady.
Q. And how old was Virginia at that time?
A. 15.
Q. And what was she doing?
A. Going to school.
[fol. 76] Q. Will you give us the name of the school, please, and what class she was in?
A. Seton Academy.
Q. That is in Yonkers, is it not?
A. Yonkers.
Q. What is that, a grammar school or a high school?
A. Yes.
Q. High school?
A. It was then junior high.

Q. Do you know what class she was in at that time, what grade she was in?

A. The 8th or 9th—8th, I think.

Q. Who was the other child?

A. My son James.

Q. He was older?

A. Older; he was 20.

Q. And what was he doing at that time?

A. He was at Fordham College.

Q. And what class was he in, do you remember?

A. Second year.

Q. That would be the sophomore year?

A. Sophomore.

Q. And for how long had you been married to Mr. Brady?

A. 23 years.

Q. What was his age at the time that he died?

A. 62 years.

Q. What was your age at that time?

A. 58.

The Court: You say he was what, 62?

Mr. Gair: Your husband's age, his Honor has asked.

The Witness: 57; I am 60 now.

The Court: How old was he on July 9, 1938, did you say 62?

The Witness: 62.

The Court: 62?

The Witness: Yes, sir.

Q. And what was his employment at that time?

A. He was a Customs inspector.

Q. And for how long had he been a Customs inspector?

A. 38 years.

[fol. 77] Q. Do you remember where he was assigned in the period before July 9, 1938?

A. That I don't know, no.

Q. And was he working steadily up to the time of this accident?

A. Steadily for 38 years.

Q. Did you live in your home at the time, or were you living in an apartment house?

A. My own home.

Q. Do you know how much your husband was earning at that time?

A. $2,900 a year.

Q. And did he follow a certain routine so far as giving you money for the table was concerned? Did he give you certain money, each week?

A. $25 a week.

Q. Because of the food for the table. In addition to that, any other expense that was required, such as providing clothing——

A. He paid all the other expenses.

Q. Clothing for yourself?

A. He paid that.

Q. The children stayed at home, did they not, at that time?

A. Stayed home.

Q. The children are still living with you?

A. Yes.

Q. And did he pay, up to the time of his death, all of the expenses of the children?

A. Everything.

Q. Did he have a car?

A. Yes.

Q. And on vacations did he go with you to various places?

A. We would go to Canada.

Q. Take the period of approximately ten years before the accident, what was the condition of his health, so far as you could observe it?

A. Good.

Q. In that period of approximately ten years had he been confined to bed during that time for any ailments, so far as you can remember?

A. The past ten years, do you mean?

Q. Yes.

A. Never.

Q. Had he complained of any pain to the area of his stomach or abdomen?

A. Never.

Q. So far as you know, had any doctor visited him at his home for the purpose of treating him for any complaints so far as the abdomen is concerned?

A. Never.

[fol. 78] Q. What is the first thing you knew about the fact that an accident had happened? When was the first you knew about the accident?

A. When he rang the bell I answered the door.

Q. You mean that Saturday, July 9th?

A. That Saturday he was hurt.

Q. Do you remember about what time it was that he came home?

A. I would say it was between 3 and 4 o'clock.

Q. Don't tell us what he said, because that you are not permitted to do, but tell this: after he got home did you notice anything about him and say what he did?

A. Excessively pale and weak.

Q. Was he holding any part of his body?

A. Yes, he was holding his side as he went to the telephone.

Q. As you are sitting in the box there you are holding your hand to the lower part of your right side?

A. Yes, sir.

Q. Had you ever noticed any such action on his part before that time?

A. No, sir, never.

Q. Will you answer this just yes or no: did he have a talk with you about something having happened, without telling us what it was. Did he tell you? Yes or no.

A. I said "What is the matter?"

Q. And did he answer you?

A. He answered, yes. "I met with an accident."

Q. You are not allowed to say that. That is why I am interrupting you. You are not allowed to say what he told you.

The Court: Well, nobody has objected to it, so what is the difference.

Q. Well, when you spoke to him what happened?

A. He said, "I met with an accident on a ship."

Q. And then what happened?

A. He went to the phone and called his doctor and brother.

[fol. 79] Q. And was his car home at the time?

A. His own car wasn't home at the time; his brother came for him.

Q. Did he have a car at that time himself?

A. Yes, he did, but my son was away in it to school.

Q. So he called his brother?

A. His oldest brother came for him.

Q. And where did they take him?

A. To the doctor's office.

Q. Give us the name of the doctor, please.
A. Dr. Lopez.
Q. And is Dr. Lopez located in Yonkers?
A. He lives in Yonkers, yes.
Q. Did you go along, Mrs. Brady?
A. I went with him.
Q. So you and the brother went with your husband to the doctor's office, and after the doctor examined him where did he go?
A. He sent him home, made him come home and be put to bed.
Q. And was he put to bed when he got home?
A. Put to bed for a week.
Q. From the time that he was put to bed on that Saturday after the accident, when did he leave his bed?
A. Never.
Q. Was he taken from your home?
A. Taken from his bed to the hospital.
Q. And you say that that happened—how long after that was he taken from his bed to the hospital? How long after? When was he taken from your home?
A. Taken to the hospital?
Q. Yes.
A. Between 3 and 4.
Q. I mean on what day of the week?
A. Saturday, the day he was injured.
Q. Saturday he was injured and he was put to bed. How long after that did he go to the hospital?
A. To the hospital he went the following Saturday at about 11 o'clock in the morning.
[fol. 80] Had he been in bed up to that time?
A. All week.
Q. What was being done for him?
A. We applied an ice pack to his side.
Q. Had Dr. Lopez seen him at the house in that week's time?
A. Twice.
Q. Can you tell us, please, when the first time was after the first visit on Saturday?
A. On Monday.
Q. Monday?
A. Yes.
Q. And when did he see him again after that?
A. On Saturday morning.

Q. During that time that the doctor was treating him——
A. Was in constant touch.
Q. Did you keep in touch with the doctor?
A. In constant touch.
Q. By telephone?
A. By telephone.
Q. Did your husband leave his bed for the purpose even of going about the house? Did he leave the bed at all for any purpose during that time?
A. No purpose at all.
Q. And after he got to the hospital that Saturday, to your knowledge was he operated on on that day?
A. I was with him all day.
Q. Was he operated on that day?
A. Operated on at 8 o'clock that evening.
Q. When did he die?
A. Tuesday morning at 2:30.
Q. Can you tell us how tall a man your husband was?
A. I would say 5 feet 8.
Q. And generally, approximately how much did he weigh?
A. About 145.
Q. And did you pay the funeral bill, Mrs. Brady?
A. Yes.

Mr. Gair: We can probably agree on the amount later, Mr. Parmer; we will get together.
Mr. Parmer: Yes.
Mr. Gair: That is all.

[fol. 81] Cross-examination.

By Mr. Parmer:

Q. I don't think I heard you correctly, Mrs. Brady. Did you say that your husband went to Dr. Lopez on the day that he had his accident?
A. Yes, sir.
Q. He went to the doctor's office that day?
A. Went to the doctor's office.
Q. And how long was he gone before he came back from the doctor's office?
A. Before he came back to the house?
Q. Yes.
A. 7:30—between 7 and 8.
Q. And he went to the doctor's office at what time?

A. He went to the doctor's office between 3 and 4. He wasn't there at that time. They said "You can't see him until his office hours," and his brother brought him home to his residence and we went over at 7:30.

Q. And when he returned to the house he went to bed?

A. Put to bed.

Q. And the doctor came to your house on Monday to see him?

A. Monday morning.

Mr. Parmer: That is all.

Mr. Gair: We have a short concession, if your Honor please, with respect to a witness whom Mr. Parmer mentioned while opening, Harry Cohn.

It is conceded that if Harry Cohn were called to testify he would testify that he was deputy surveyor in charge of District No. 4 and would testify that Inspector Brady came to District 4 on October 3, 1926, that he was exceptionally alert for his years and kept up with the more arduous duties of the position of inspector, as capably as men much younger than himself, and that up to the time of the accident he could not recall Mr. Brady's ever complaining of any trouble with his appendix.

[fol. 82] JOSEPH G. DANKELMAN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Gair:

Q. Mr. Dankelman, what is your line of business, please?

A. I am employed by the company as a cooper; in other words, a carpenter repairman. I repair all the freight that is broke, inward and outward.

Q. When you say employed by the company, which company?

A. United States Lines.

Q. United States Lines?

A. Yes, sir.

Q. Are they connected in any way, so far as you know, with the——

Mr. Parmer: I object to that, unless——

Mr. Gair: I withdraw the question for the time.

Q. How long have you been employed by the United States Lines?

A. Since 1930.

Q. Well, in connection with your work as a cooper for the United States Lines, were you at Pier 58 North River on July 9, 1938?

A. I was.

Q. Specifically what were your duties on the pier at or about the time that this accident happened to Inspector Brady?

A. We were waiting for the baggage to be taken off the ship to examine it. We have to open up the baggage for the Customs inspectors to see that it is O.K. to be entered into the country.

Q. And did you know Inspector Brady?

A. I did.

Q. And for how many years had you seen him in the course of his duties and in the course of your own?

A. I have seen him there for about eight years.

Q. On this morning did you see the steamship Unicoi when it came into the dock?

A. I did; yes, sir.

[fol. 83] Q. Can you tell us just what the position of the boat was, so far as the dock was concerned; when the accident happened was it tied up, or what?

A. They were making her fast. She was not fast; they were making her fast.

Q. So far as the gangplank is concerned, at the time this accident happened was the gangplank down?

A. The gangplank was not down; they were working on her to put it down.

Q. Did you have occasion to observe, before the accident happened, anything done with respect to a certain ladder being placed over the side of the boat?

A. Yes.

Q. Did you see the ladder at some time?

A. I did; Yes, sir.

Q. When you first saw the ladder in what position was it?

A. Well, they had a sling on it, lowering it over the side. They were putting it over the side from the top deck.

Q. In some manner?

A. That is it.

Q. Putting it over the side; and then did you see how it was finally put into position?

A. It was put on the lower deck to the bulwark plate on top; it rested on the top plate.

Q. Some of those words I don't understand.

A. That is the last plate on the ship; that is what they call the bulwark plate.

Q. However, the foot of the ladder, where was that resting?

A. On the lower deck.

Q. Off the top of the ladder, was that up against any part of any deck any way?

A. Yes, that was up against the top plate there.

Q. By the top plate—in any event that is—would that be at the place where the rail would be when you go on to the ship?

A. Yes, sir.

Q. How was it kept in position there, if you remember? Was it lashed there?

A. I didn't see no lashing.

[fol. 84] Q. Did you see anybody, so far as you were concerned, go up or down that ladder?

A. I did not, no, just Mr. Brady.

Q. So at that time you say—you say except Mr. Brady, and I am coming to that. When you saw Mr. Brady going up that ladder, at that time was the gangplank down yet?

A. No, sir.

Q. When you first saw Mr. Brady was he already on the ladder, or was he starting to get on?

A. He was on the ladder.

Q. Was this a long ladder?

A. Yes, sir.

Q. And generally can you tell us how long?

A. Approximately about 30 to 40 feet long, I guess.

Q. And when you saw Inspector Brady, just tell us what you saw him do and what you noticed happen.

A. When I looked up and seen him it was just as though something gave way under him and I seen him struggling and swinging around there, I seen him catch the wood again and then I walked out toward the ladder and I seen this rung fall down into the river, and I know that broke under his weight, so then he got his weight all right on the ladder again, and I don't know now if he went up the ladder or down again, I just looked at that rung that broke and it

looked to be very rotten looking in the part of the ladder that the rung came out, see.

Q. I want you to explain when you say—just what you mean when you say you saw Inspector Brady struggling; just what you mean by that.

A. Like any other man trying to catch his weight, you know; he was trying to grasp another rung or so, and he did so, he just went back up a little, I should say—you know how you climb a ladder. Sometimes something breaks on it and you come down, I don't know how many inches a rung is, and he just hung on and went down to the next rung.

Q. And he disappeared?

A. No, he hung on.

[fol. 85] Q. You have no recollection, you say, whether he continued on or came down again?

A. No.

Q. The part you say was rotten, will you tell us what part you are referring to?

A. That is the plug that fits into that side piece of the ladder.

Q. This was a wooden ladder?

A. Yes, with little wooden steps about an inch and a half diameter, and they fit into these two uprights.

Q. In other words, wooden sides and wooden steps or rungs?

A. Wooden rungs.

Q. And you regularly in the course of your work have been working with and handling wood for a long period of time?

A. Yes.

Q. And the part you say was rotten was the part that fits into the upright, into the side of the upright?

A. That is right.

Mr. Gair: That is all.

Cross-examination.

By Mr. Parmer:

Q. Mr. Dankelman, did this ladder extend at all above the deck of the ship?

A. Yes, it did.

Q. How far above the deck of the ship did the ladder extend?

A. I could not say exactly how far, but it was away up higher than the deck, because the ship had just come inbound and she had a good load on, she was down pretty low, and that ladder extended away up above that top plate some; I just could not tell you how high. It stuck up there pretty high.

Q. And at the place where it had contact with the ship, where it touched the ship, was there a rail?

A. There was a rail, yes, sir.

Q. About how high was that rail above the deck of the ship?

A. Well, this rail stood right on top of that plate.

[fol. 86] Q. What is that?

A. This rail stood right on top of this plate, this top plate. It is a sort of a channel. They call it a channel, see, and it is upside down. What they call the toe of the channel lays down, and it is riveted on top of that plate, and that ladder rested on that channel.

Q. Was it almost perpendicular, or was it——

A. Well, it was about a 45 degree slant like that (illustrating).

Q. 45 degree slant?

A. About 45.

Q. Did you see anybody coming down the ladder?

A. I did not, no, sir.

Q. How long after the ladder was put down did Mr. Brady go up it?

A. I could not exactly tell you that. A few minutes, anyhow, after the ladder hit the dock.

Q. Was there anybody up at the deck of the ship?

A. The sailors was already up on top of one of the hatches there.

Q. On top of one of the hatches?

A. Yes, sir; No. 4 hatch I think it was.

Q. How far had they proceeded at that time with putting out the gangway?

A. They had already hooked up, she had a sling around her ready to be—you see they hoist it over with steam, with power, see.

Q. Yes.

A. And they had already hooked it to go ashore. About 10 or 15 minutes after that ladder was put over the side I guess they put the gangway over.

Q. Did you have any duties on board the ship?

A. Oh, yes.

Q. Why didn't you go up the ladd. ?

Mr. Gair: I object to that, if your Honor please, as being wholly irrelevant, immaterial and incompetent.

The Court: Objection sustained.

Q. How did you get on board the boat when you went aboard?

[fol. 87] Mr. Gair: I object to that on the ground of its being subsequent to the time of the occurrence.

The Court: Overruled.

Q. How did you get on board when you did go on board?

A. I went on board with the gangway.

Q. How long had you previous to this time been working at that dock?

A. Eight years.

Q. How long had you been acquainted with Mr. Brady?

A. Eight years.

Q. And had you observed, during that time, other occasions on which Mr. Brady had gone on board steamships?

A. I don't remember ever using a ladder; no sir.

Q. What is that?

A. I don't remember ever have climbed a ladder before.

Q. I did not ask you that. I said had you observed any occasions when he had gone on board ships?

A. Oh, yes, I have seen him on ships.

Q. Was that his regular business, to go on board ships?

A. Yes, sir.

Q. And was it your regular business to go on board ships, too?

A. Oh, yes; yes, sir.

Q. And were you acquainted with any custom or usual practice with regard to the means provided at that pier for going on board vessels?

Mr. Gair: If your Honor please, I object to that as being wholly irrelevant and immaterial. It seems to me the ladder was placed over the side of the ship. Unless there was some regulation which was made known to Mr. Brady——

The Court: I will let him testify to what he knows about it.

Mr. Parmer: Will you repeat the question.

Q. (Read.) A. Well, we always used to go up on the—we were instructed not to use the ladder, so we always [fol. 88] used to use the gangway. Of course our work called for examining the baggage, and you could not carry baggage down a ladder.

Mr. Gair: I move to strike out any instruction given to this gentleman as a cooper going up a ladder, as having no reference to the inspector of the Customs service, and I move to strike it out.

The Court: No, I will let it stand. He was instructed by whom? You mean by your own people?

The Witness: By the superintendent; yes, sir.

Mr. Gair: May I have an exception, if your Honor please.

The Court: Yes.

Q. Have you seen such ladders as Mr. Brady used put out from vessels arriving at that dock on previous occasions?

A. Yes, I have seen ladders put out; yes, sir.

Q. And had you observed by whom they were customarily used?

A. Well, the pilots generally; I generally used to see the pilots come down from the ship to the dock.

Q. And how long after the accident to Mr. Brady was it that the gangway itself was put out?

A. I should judge about 15 minutes or so.

Q. How far away were you from the broken rung of the ladder when you saw it in that condition which you have described as "rotten"?

A. I was right under it, right alongside of the ladder.

Q. How far above you was it, the rung which you have described as rotten?

A. The rung was about the 13th rung up.

Q. And how high was that?

A. Well, that is about 13 or 14 feet. That is from the dock up.

Q. Did you ascend the ladder to get a better view?

[fol. 89] A. Well, yes, I walked out to the end of the stringpiece and looked up.

Q. Well did you go up the ladder?

A. I did not; no, sir. I did not go on the ladder at all.

Mr. Parmer: That is all.

Re-direct examination.

By Mr. Gair:

Q. Have you observed, in the course of your experience, when this ladder was placed over the side that the members of the crew would go up and down the ladder?

A. Yes, sir.

Re-cross examination.

By Mr. Parmer:

Q. In order to get from that ladder to the ship after you had ascended it, so far as you know what would you have to do?

A. You would have to lower yourself off that top plate there, that beam that runs across; you would have to lower yourself down, sort of jump down onto the top of that deck—that angle-iron down to the bottom of the deck—the top of the deck, rather.

Q. Well, would the rail be in the way at all?

A. No, no; you would just have to step off the ladder down onto the rail and then there would be about a 4-foot drop.

Q. A 4-foot drop from the rail to the deck?

A. That is it.

The Court: From the rail to what?

The Witness: To the deck, the top deck.

Q. Can you give us a little diagram which will show what you mean? Are you good at drawing things?

A. I used to be.

Q. All right. I think it will make it clearer (handing [fol. 90] paper). Draw something which will illustrate what you would have to do when you transfer from the ladder to the deck.

A. (Witness draws sketch.)

Q. Is this the diagram that you have drawn?

A. Yes, sir.

Mr. Parmer: I will mark it in evidence, if your Honor please, and I will have him explain it and we can mark it with letters and numbers so we can understand it.

(Marked Defendant's Exhibit A.)

Q. Now you have here a vertical line with cross lines. That is the ladder, is it?

A. That is a ladder; yes, sir.

Q. And you have here at the top part something which you call——

A. That is the channel that sets on top of that plate. That is the top plate of the ship.

Q. The top plate of the ship?

A. That is the channel sets up on top of that plate, and that channel is bolted right down to these angle-irons.

Q. Then you have the top of the rail written in here?

A. Yes, sir.

Q. At about the same level as this angle-iron you are talking about?

A. Yes; that is pretty near flush there.

Q. And then you have at another level a horizontal line, on top of which you have written the work "deck."

A. That is the deck of the ship.

Q. And is the distance between the deck of the ship and the top of the rail 3 or 4 feet?

A. Between 3 and 4 feet; yes, sir.

Q. And this ladder at the upper end extended above the top of the rail of the ship as you have shown it in the diagram here?

A. Yes, sir.

Q. Now in going up the ladder, after you reach the top of the rail——

A. You have got to swing off on that rail, and some ships [fol. 91] they have a little pair of stairs, see, to get down on a little bit of a table.

The Court: Jump down this thing?

The Witness: Yes.

The Court: Just the same as if you came up to the jury box on this side and you got up to the top and stood there and you wanted to get down you would jump down, or swing down?

The Witness: On the other side, yes. This is just this part like (indicating), and the deck is on the other side.

Q. If the ladder came up to about here on this rail you would have to get up here and jump down here on the other side?

A. That is right.

By the Court:

Q. You said something about seeing this rung of the ladder after it was broken. Where did it fall?

A. Down in the river.

Q. In the river?

A. Yes, sir.

Q. You didn't retrieve it and then look at it afterwards, did you—you just saw it as it fell?

A. I saw it as it fell, and I looked down to the water.

Q. How far was the water from you?

A. I should judge 5 to 6 feet.

Q. When you described it as being in rotten condition, were you near enough to see?

A. Oh, yes, your Honor.

By Mr. Gair:

Q. When you describe something as rotten are you talking now about the piece of the rung that was in the water, or the remaining part of it that was left still sticking into [fol. 92] the side of the ladder?

A. Sticking into the side of the ladder.

By the Court:

Q. That is, it broke in the middle, it didn't break in the end?

A. No, it broke in——

Q. It didn't pull out?

A. It broke in the support, yes.

By Mr. Gair:

Q. I want you to explain it again. Part went away, and that was gone, and you made no examination of it, that fell in the water?

A. No.

Q. The statement you made with respect to a rotten condition was something that you saw still fixed into the side of the ladder?

A. That is it.

Q. Will you tell his Honor and the jury, please, just what part of it was still sticking into the side of the ladder?

A. Yes. A piece of the rung. You all know what a rung of a ladder is. A piece of the rung was sticking in there,

sticking in the uprights. There is two uprights to all ladders.

Q. Be patient with us a minute. You call this the rung (indicating)?

A. Yes, sir.

Q. What does it do, go into a ladder where?

A. Yes, sir; projects in about an inch and a half.

Q. Was part of that part that usually projects in still sticking out?

A. Yes, sir.

Q. And that is the part that you are talking about?

A. That is the part I am talking about.

Mr. Gair: That is all.

(Short recess.)

[fol. 93] MICHAEL E. LYONS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Gair:

Q. Inspector, are you employed by the United States Government?

A. Yes, sir.

Q. In the Customs Service?

A. As a Customs inspector.

Q. And for how many years have you been a Customs inspector?

A. About 25.

Q. And in his lifetime did you know James Brady?

A. Yes, sir.

Q. And for how many years did you know him?

A. About 28.

Q. And were you connected with him in the course of your regular duties at Pier 58 North River on July 9, 1938?

A. I was.

Q. Coming down to the Saturday morning of the accident, do you recall about what time of the day the accident happened?

A. About 9 o'clock.

Q. That is in the morning?

A. In the morning.

Q. And you did not see the accident yourself, Inspector, did you?

A. No.

Q. Do you remember the steamship Unicoi coming into the dock that morning?

A. I do.

Q. And will you tell us, please, was there a division of duties to be performed with respect to that ship between you and Inspector Brady?

A. Mr. Brady, and I was assigned to take care of the vessel.

Q. Yes.

A. He was to board the vessel, swearing the captain to the manifest, pick up the captain's papers, the individual manifests, the crew lists, baggage list.

Q. And you?

A. And I was to examine the passengers' baggage, with his assistance if necessary.

[fol. 94] Q. And the accident happened and you did not see it, you told us. After the accident happened did you have occasion to see Inspector Brady?

A. Yes, he came back to the office.

Q. And what did you notice about him then?

A. He was in pain.

Q. Did you see him holding any part of his body?

A. He was holding his side.

Q. Do you know? Tell the jury, please, the extent of the work he did after that, so far as you remember.

A. He didn't do anything after that.

Q. And did you ever see him back at his work after that Saturday?

A. No.

Q. Of course you were familiar with the fact he died?

A. Yes, he died.

Q. Particularly, Inspector, with reference to ship's ladders, have you in the course of your work boarded the ship by ship's ladders?

A. Many times.

Q. Such as you have heard described here in court?

A. Many times.

Q. And were you ever told or instructed or prohibited from using such a ladder?

A. Never.

Mr. Gair: That is all.

Cross-examination.

By Mr. Parmer:

Q. Did you ever use a gangway, too?

A. I use all means or methods for getting on board ships.

Q. Did you ever ask the people who were operating the ship what method they provided for your use, or did you just go ahead and take anything that was handy?

A. Well, we generally boarded on whatever they provided for us, unless we thought it was unsafe, and if we thought it was unsafe we would not go on, that is all.

[fol. 95] Q. The question I asked you was, were you ever attentive to ascertaining what was provided for you, or did you take anything that was available?

Mr. Gair: I object to the form of the question, if your Honor please—was he ever attentive.

The Court: It is objectionable, but I think he can answer it.

Mr. Parmer: I will ask the stenogropher to read it.

Q. (Read.)

A. Did I take anything that was available?

Q. Maybe it is confusing, I want to know this—I will withdraw that question.

The Witness: It might have been a lift——

The Court: I guess it was so bad that I was wrong in thinking that it could be answered by even an intelligent man like the inspector.

Q. I want to know whether you knew, when you went on board ships that some means of going on board the ship were intended for you and some were not?

A. That is right, yes.

Q. Well now, what have you done or what did you do to find out what was intended for you and what was not intended for you to use?

A. We didn't do anything. The ladder was put up there, we went up.

Q. If there was a ladder down from a ship to the dock, you always took it for granted that it was intended for your use?

A. Absolutely, if there was no other means of egress or ingress.

Q. And did you take it for granted that it was intended for your use when you knew that a gangway was going to be put out later?

A. I don't know anything about that. I didn't say anything about the conditions on that pier that day. [fol. 96]

Q. Well, were you acquainted with conditions at that pier in general from your past work?

A. Certainly I was.

Q. Did you know at that time that such vessels always put out gangways?

A. In recent years always gangways are put out; in recent years, yes.

Q. I don't know what you mean by recent years. I mean at that time did you know that gangways were always put out on such vessels?

A. Yes, surely.

Q. And did you, having such knowledge, assume when you saw this ladder put out, or such ladders, that they were intended for your use?

Mr. Gair: If your Honor please, I object to it on the ground that the question is——

The Court: He said he didn't see the ladder.

The Witness: I didn't see the ladder.

The Court: Did you see it?

The Witness: I did not see the ladder. I don't remember the ladder.

Q. Well did you, in seeing such ladders on other occasions, take it for granted that they were intended for your use without some——

Mr. Gair: I object on the ground it has already been answered by the witness.

The Court: Yes, he has already answered that.

Mr. Parmer: Very good. That is all.

Mr. Gair: Will your Honor take judicial notice of the fact that under the expectancy tables, the mortality tables, the

expectancy of life of Mr. James Brady was 12½ years at the time of his death?

[fol. 97] Now with respect to the funeral bill, I might say that the original is not in our possession, it is in Washington, but that the amount is $480. I can make proof of it by bringing Mrs. Brady back, but I think that is the amount we have been furnished with.

Mr. Parmer: Well I will take your statement, Mr. Gair.

Mr. Gair: There is no dispute about the amount?

Will it be conceded, then, that $480 would be a fair and reasonable sum for the funeral of Mr. Brady?

Mr. Parmer: Yes.

Mr. Gair: If your Honor please, we have medical testimony which has as yet not become available, but will be here at 2 o'clock. I understand that Mr. Parmer would like to take up some questions of law in the absence of the jury in any event, which may consume some time.

The Court: Who said that?

Mr. Gair: Mr. Parmer told me he intended to speak, of course.

The Court: I mean who said it will take considerable time?

Mr. Gair: Considerable? I didn't use that word, but would require some time, of course, to spread on the record.

The Court: I don't think Mr. Parmer takes very long in spreading it on the record, from past experience. He is what you call a direct shooter.

Mr. Gair: Yes. I thought we were both very fast this morning.

The Court: Well, the jury and the Court are here to do whatever is proper. I like to move these cases along just as fast as humanly possible.

[fol. 98] Mr. Parmer: I don't know whether Mr. Gair intends to call another witness who has been subpoenaed.

Mr. Gair: No. I think that has already been covered, the facts, and I don't intend to call any more fact witnesses.

Mr. Parmer: I see.

Mr. Gair: I think everything has been covered with the exception of two doctors we wish to call, and one is coming from Yonkers and will be here at 2 o'clock, and the other will be here at 2.

The Court: Why don't you talk to Mr. Parmer and decide what you would like to have the jury and Court do at the present time.

Mr. Gair: 2 o'clock, of course, would be the handiest suggestion, but if there is anything could be done in the meantime, even in the absence of the jury, why, we could do that.

Mr. Parmer: I would like an opportunity, as I said before, at a certain time in the trial to indicate my position on the law.

The Court: What is the use doing it now and doing it again at the end of the whole case? Why not reserve your motion. It is always a pleasure to hear you, but——

Mr. Parmer: Thank you; and I realize that technically I am not able to make my motion yet because I have not proved the facts upon which it will be made, but I think this might be cited meantime——

Mr. Gair: I think it could be.

Mr. Parmer: This case I have. I don't think you concede that, but I could outline my position to your Honor, which was not fully set forth in the case which you read, the Quinn case.

[fol. 99] The Court: I think I have read enough so I can imagine just exactly what your position is going to be.

Mr. Parmer: Very good.

The Court: It won't require any great exposition on your part, will it, in order to define it?

Mr. Parmer: Well I don't think it will with your Honor, but I have already had difficulty in this court in getting my position across. I have already had some difficulty——

The Court: Well when you say getting it across you mean making it effective?

Mr. Parmer: To be specific, I really think to have one judge understand it—I don't think he understands my position yet.

The Court: I feel very much complimented, but I am not at all sure your psychology is good, so far as I am concerned.

Mr. Parmer: Well, it is not entirely intended as a compliment, but your Honor has had experience with this particular branch of litigation.

The Court: Well I return to my original inquiry as to what you gentlemen wish the jury and Court to do at the present time, 20 minutes past 12. Shall we take a recess until 2 o'clock?

Mr. Gair: I think so.

Mr. Parmer: Very good.

The Court: Or have you something else we can do meantime?

Mr. Parmer: Well I would like to call later this one witness who has been subpoenaed by Mr. Gair, and whom he has not called, and if I might call him out of order I would save the time.

Mr. Gair: I have no objection to that whatever.

[fol. 100] WILLIAM WRIGHT, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Parmer:

Q. Mr. Wright, how old are you?

A. 56-7.

Q. And by whom are you employed now?

A. I am employed by the United States Lines.

Q. Do you mean to say that you changed your employment recently?

A. Well, since I have been with that concern, I am 30 years with the same line.

Q. And in July, 1938 by whom were you employed?

A. The United States Lines.

Q. And were you present at the time that Mr. Brady was on the ladder?

A. Yes, sir.

Q. Did you see something happen to him on the ladder?

A. A bit of commotion up at the top.

Q. A bit of commotion you describe?

A. Yes, sir.

Q. Tell us in more detail what you saw?

A. I looked up and Mr. Brady was hanging on a rung with his foot below the one that was broke, and then he went on aboard the ship.

Q. You mean he went up?

A. Up; and there is a bulwark, and here is the ship coming up and this ladder was about 8 or 9 feet above this bulwark, and he had to get around and stand on this bulwark to get to the well deck of the ship. That is about all I see.

Q. You say he has to do it. Are you trying to tell us in that language that you saw him do it?

A. No, I am not telling you that, but that is how he got on if he got on any way.

Q. Did you see him get on in that way?

A. I see him get on that way.

The Court: Get on what?

[fol. 101] The Witness: Get on the ship, sir.

The Court: That was after the rung had broken?

The Witness: Yes, sir.

Q. Well did you see Mr. Brady at any time thereafter on that day?

A. I seen him in the Customs House, or up around that section; that is the Customs House on the pier, and he asked me would I be a witness and I said sure, I said I seen it happen.

Q. Well how long after this accident happened was it that you saw him later on in the day?

A. It might have been—in the afternoon it was.

Q. Four or five hours after?

A. About four or five hours after the accident.

Q. Did he say anything with respect to what had happened to him?

A. I asked him what happened, and he said "I got a pain in my leg," and he pointed up here some place (indicating).

Q. Is that the only complaint in regard to pain that he made?

A. That is all. I told him I would be his witness, and so forth.

Mr. Parker: That is all.

Cross-examination.

By Mr. Gair:

Q. Mr. Wright, you were subpoenaed here to court by us; that is, by the attorneys for Mrs. Brady?

A. Yes, sir.

Q. Were you subpoenaed here to court by the attorneys for the Roosevelt Company?

A. No, sir.

Q. You really came to court in response to our subpoena?

A. Yes, sir.

Q. Now after you came to court we spoke to you this morning; that is, my office representative spoke to you in the hall?

A. Yes, sir.

[fol. 102] Q. And you also spoke to Mr. Parmer, the attorney for the company?

A. Just a minute here.

Q. While the Court was in recess?

A. Yes.

Q. He came over and spoke with you then?

A. Yes.

Q. Well now, did you have any conversation with Mr. Parmer about whether the complaint that Mr. Brady had made after the accident was of pain in his leg or pain in his side?

A. I told him to look at my statement, he would find that out.

Q. You remember you made a statement for the attorneys for Mrs. Brady?

A. Yes, sir.

Q. Do you recall how soon after the accident you made that statement?

A. Oh, I could not exactly say.

Q. Approximately.

A. I could not tell you.

Q. Was it within a week?

A. It might have been.

Q. A week or two?

A. I could not exactly say.

Q. It was shortly after he died?

A. Yes, it was after he died.

Q. Well, can you tell us whether it was within a month after he died?

A. I don't know. I could not tell you, sir.

Q. Well now, this statement that you made bears your signature, does it not?

A. That is right.

Q. And not only does it bear your signature, but at the bottom in your own handwriting didn't you write the words "I read the above and know it to be true"?

A. That is right.

Mr. Gair: I offer it in evidence.

Mr. Parmer: No objection.

(Marked Plaintiff's Exhibit 3.)

Q. Do you say to this jury, Mr. Wright, that Inspector Brady did not tell you that he hurt his right side?

A. He did not.

Q. Do you recall that when you saw him right after this commotion his body was swinging?

A. That is right.

[fol. 103] Q. When you say his body was swinging, what do you mean by that?

A. He was making a grasp for the other rung to hold himself on, and naturally your body will swing.

Q. At the times you have in mind, did you see his body swinging from side to side, or swinging around to regain his balance?

A. Well, yes, it did.

Mr. Gair: May I read this to the jury, please?

The Court: Certainly.

(Plaintiff's Exhibit 3 read to the jury.)

Q. Do you know of your own knowledge whether there is any connection between the Roosevelt Lines and the United States Lines?

Mr. Parmer: I object to that, unless he has knowledge.

A. I don't know whether there is or not.

Redirect examination.

By Mr. Parmer:

Q. Mr. Wright, did someone else see you on some other occasion and obtain a statement from you?

A. Well, they came down to get statements off me, but I told them I had made that out.

Q. What is that?

A. They came down there, I don't know who it was, but I made a statement out for the first chap, whoever he was, I don't remember him, and that is the only one statement I made out.

Q. Well, see if this is your signature to this paper (handing to witness)?

A. That is right.

Q. It that your signature?

A. Yes, sir.

Q. Does that refresh your recollection?

A. Yes, sir, it does.

[fol. 104] Q. With respect to whether you signed one or two statements?

A. Yes, sir.

Q. Can you recall when you signed this statement?

A. That was made out on the dock.

Q. This statement, marked Plaintiff's Exhibit 3, this statement that was produced by Mrs. Brady's lawyer—when, if you can——

A. It was down on the dock, but it was away after the time.

Q. What is that?

A. That was after the death of Mr. Brady.

Q. You don't recall when?

A. I don't recall when, sir.

Mr. Parmer: There is no date appearing upon it, Mr. Gair.

Mr. Gair: That is why I inquired.

Mr. Parmer: Do you have any information as to when——

Mr. Gair: We were not the attorneys at that time.

Mr. Parmer: I see.

Q. Now do you recall when you signed this statement which I have just shown you now?

A. Yes, sir.

Q. About when was that?

A. I reported it that day and gave it to the—reported to my timekeeper first.

Q. Yes.

A. Gave him all the facts on it.

Q. Yes.

A. Then I did sign something. That is the timekeeper's, isn't it? But I make these reports to my timekeeper when an accident occurs on the dock, I make a report to the timekeeper right away and cover everything, and I imagine I signed the same day.

Q. Well now, will you explain, Mr. Wright, how it comes that in this statement which has been produced by the lawyer for Mrs. Brady it says here, over your signature, "I asked Mr. Brady was he hurt, He pointed to his right side. A short time later I saw him and told him I had [fol. 105] reported his accident. He told me he hurt his right side." Can you explain how that is in there?

A. I can't explain it. The only conversation I had with Mr. Brady was when he was up in the Customs House.

Q. Yes.

A. Around that section. I asked him, "Jim, how are you feeling"? And he said "I hurt my leg," or something. He might have pointed out that way (indicating), the knee or his stomach.

Mr. Gair: I don't get that.

The Witness: I say when I met Brady after a while I said, "How are you feeling, Jim," and he said "My leg," so the hurt may have been up higher than where he pointed.

Mr. Gair: Did you ask him where he pointed?

Mr. Parmer: No, I didn't ask him where he pointed. He pointed to his leg, and he said the hurt might have been up higher than that.

The Witness: Right around here (indicating).

Mr. Gair: Will you please stand up? And he pointed where?

The Witness: About there (indicating).

Mr. Gair: Above the knee?

The Witness: Well, yes.

Q. Did he show the leg to you?

A. No, sir.

Q. How long had you known Mr. Brady before the accident?

A. Oh. I had known him for years.

Q. How many years?

A. I will say 15 at least. He has been on and around the piers a long while.

Mr. Parmer: That is all.

Mr. Gair: That is all, sir.

The Court: Now you want to take a recess; is that the idea?

Mr. Gair: Yes, sir.

(Recess to 2:15 p. m.)

[fol. 106] Afternoon Session

(Testimony of Dr. Enrique A. Lopez, omitted.)

(Testimony of Dr. Edward Adams, omitted.)

Mr. Gair: That is the plaintiff's case. Plaintiff rests.

(Court and counsel in conference at the bench.)

Mr. Parmer: I move on behalf of the defendant to dismiss the complaint, on the ground that there has been a total failure of proof of any negligence on the part of this defendant, or on the part of any person for whom this defendant would be legally responsible.

The Court: I will deny your motion at this time. You may renew it at the end of the case, and I give you an exception.

Mr. Parmer: Exception.

The Court: We will adjourn until 10:30 tomorrow morning. I think you said there was some proof of a legal and technical nature, in which unless they are particularly interested the jurors need not be present.

Mr. Parmer: That is right.

The Court: What do you suggest in that respect?

Mr. Parmer: I suggest that we might take about one hour, or at the outside an hour and a half, and that the jury——

The Court: From that time on how long will the case take, do you think?

Mr. Parmer: Thereafter my case would not take longer than an hour.

The Court: You are suggesting, then, that we ask the jury to come back at half-past eleven instead of half-past ten?

Mr. Parmer: Yes, I am.

[fol. 107] The Court: I assume the jury will not be averse to that disposition. We will put it off until tomorrow at 11:30 so far as the jury is concerned.

(Adjourned to October 21, 1941, at 10:30 a. m.)

New York, October 21, 1941;
10:30 o'clock, a. m.

Trial Resumed

William E. Collins, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Parmer:

Q. Mr. Collins, you are a member of the bar of this court?
A. I am.

Q. And do you have employment by the United States?

A. I do. I am District Counsel at New York for the United States Maritime Commission, and also special assistant to the United States Attorney for this district in admiralty matters.

Q. And have you received any instructions on behalf of the United States with regard to this case we are now trying, Brady vs. Roosevelt Steamship Company?

Mr. Gair: I object to that as incompetent, irrelevant and immaterial.

The Court: What is that?

Mr. Parmer: It is that the United States has an interest in this case which they wish us to put before your Honor.

[fol. 108] The Court: I suppose that is argument. It will appear from the contract, and I don't believe it is denied.

Mr. Parmer: Well, the interest that they have, your Honor—what I wanted to show by proof because the Supreme Court in the Johnson case said it might be shown, is that there is an objection on the part of the United States to this case proceeding at common law.

The Court: I understand the point clearly.

Mr. Parmer: And I merely wanted to present it in the way that it is indicated in the case I should.

The Court: The mere fact that he has received instructions from somebody doesn't help. I will assume he is here by authority.

Mr. Parmer: Meaning we don't have to prove any instructions?

The Court: Yes.

Q. Do you on behalf of the United States wish to inform the Court as to the position of the United States with respect to this case?

Mr. Gair: I object to that, if your Honor please, as not binding upon the plaintiff and not relevant or material to any issue in this action.

The Court: I will assume that he does, and I will take it his answer is yes.

Q. Will you please, therefore, inform the Court of the position of the United States with respect to the maintenance of this case at common law?

Mr. Gair: Same objection.

The Court: Same ruling.

[fol. 109] Mr. Parmer: Do you rule that——

The Court: I rule that he can go ahead.

A. I have received instructions to object to the bringing of this case at common law as contrary to the policy of the Government in these matters, which it has consistently pursued, to my knowledge, for at least 15 years. That is, it has taken the position that since the Congress provided in the Suits in Admiralty Act a cause of action in Admiralty or damage in admiralty in any case having admiralty jurisdiction, litigants should be confined to the admiralty court in those cases, and the Government could not and should not consent to or approve the bringing of those actions at common law with jury trials.

Q. What is the position of the United States with respect to the payment of any judgment that might be rendered against Roosevelt Steamship Company?

Mr. Gair: I object to that, if your Honor please, on the ground that there is a contract between these parties which defines their relationship.

The Court: I will sustain that objection.

Q. Mr. Collins, in stating your objection on behalf of the Government to the maintenance of this case, you referred to cases brought against the United States. I am going to ask you whether the language you used was meant to be confined to cases brought against the United States or is it applicable to cases brought against agents as well?

Mr. Gair: I object to that, if your Honor please, unless the witness is now stating under the ruling of your Honor that these are specific instructions given him with reference to other cases.

The Court: I will let him testify.

[fol. 110] A. My answer was intended to extend to all cases brought against the managing agents of Government merchant vessels, because obviously there could be no action at law against the United States. As I have said, the United States has consistently maintained that these suits should be brought in admiralty. If any judgment were obtained against these operators at common law, the Government would have to pay them.

Mr. Gair: I object to that. The question with respect to judgments is not involved in the answer to the question put.

The Court: I will let it stand.
Mr. Parmer: That is all.

Cross-examination.

By Mr. Gair:

Q. Have you any letters with you with respect to what you just testified to?
A. I didn't bring any letter with me, but I——
Q. That is an answer. Have you any such documentary letters with you?
A. No.

Mr. Gair: That is all.

Wilbur F. Carley, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Parmer:

Q. Mr. Carley, what is your employment?
A. I am certifying officer for the United States Maritime Commission.
[fol. 111] Q. And what does that mean?
A. Why, with respect to payments made by the Treasury Department in connection with managing operators' commitments, certifying to the thing.
Q. In 1938 did you have such a position?
A. Yes.
Q. And did you have anything to do with the managing agreement between the Maritime Commission and the Roosevelt Steamship Line, which included the steamship Unicoi?
A. Yes, I did.
Q. And in the course of your certifying, will you tell us just what you do?
A. Why, any commitments incurred by any of the vessels under operation by the Roosevelt Steamship Company are submitted to me for certification to the Treasury Department for payment.
Q. And in the course of that practice what bills were actually paid by the United States?

Mr. Gair: If your Honor please, I object again, on the ground that that subject as to what is to be paid by the Government and what expenses are not to be paid, and what the company itself is to pay is fully defined by the contract.

The Court: I think that is true.

Mr. Parmer: The practice, your Honor, will show actually what was done by the parties. It is not an amendment to the contract.

The Court: The agreement itself is perfectly clear on that subject. I don't see that the practical construction is going to help very much.

Mr. Parmer: Of course if it is clear there is no point to the evidence; I agree with you on that.

The Court: I haven't read through the agreement itself, but a recovery in such an action as this would be included among the disbursement payments which would be sub-
[fol. 112] mitted by the Roosevelt Steamship Company to the Maritime Commission.

Mr. Gair: We don't agree to that at all, on the ground that this would be a dereliction, it would be incurred in a dereliction of a duty and something for which they were supposed to indemnify the Government, and if the Government paid it out they could sue them for it and collect.

The Court: However, I think it is precluded by the decision of the Circuit Court of Appeals in the Quinn case, insofar as I am concerned.

Mr. Parmer: Well, so far as operation and control of the vessel, that, your Honor, should be precluded; but that is not the point I am raising here as to who operated and controlled this vessel. My sole point here is assuming that the C.C.A. is right and that we did operate this vessel and all these people are our agents, nevertheless by reason of the contract the Government pays the bill eventually, and that is really the point I am making.

Mr. Gair: Under any construction of this contract the United States not only would not pay the bill, but it is not called upon to pay the bill, because it requires the steamship company to make proper repairs.

The Court: Well, I certainly am in no position to determine that question now, and I don't think it is germane to this particular inquiry.

Mr. Parmer: I have here a witness who knows what bills were actually paid under the contract, and if there be a

dispute between us as to the meaning of words, I take it that his evidence might be helpful in determining what it meant.

The Court: What bills were paid in the past?

Mr. Parmer: What bills were paid under this contract at the time of this controversy.

[fol. 113] The Court: There, again, we might be trying any number of issues which have nothing to do with this case, even assuming that you are right that such testimony as that would be competent in connection with this controversy, but I don't think this Court should do that—go outside to determine whether such bills as he might say were paid in 1938 were properly paid under this contract.

Mr. Parmer: I don't submit it to your Honor to show that they were properly paid. Your Honor would have to determine whether they were properly paid, of course.

The Court: But I certainly am in no position to do that, and there might be a controversy about it and I would be trying issues here for days.

Mr. Parmer: I offer to prove, your Honor, that among the bills that were paid by the United States were judgments against an agent for tort committed on a vessel; in other words, a judgment in which Roosevelt Steamship Company was one of the parties. That would be relevant to the sole point I am making here, that the Government pays these bills.

The Court: I will rule that that is not competent evidence in this case, and will therefore preclude that evidence.

Mr. Parmer: Very good. I have an exception to that.

The Court: Exception if you need one.

Mr. Parmer: I forgot. It is a new rule.

Mr. Gair: If your Honor please, I have just found a letter that has been shown to me from our files with respect to Mr. Collins's authority, a letter written from Washing-

[fol. 114] ton, and in view of the fact that this gentleman has asserted he had some authority, a paragraph in this letter to the effect that he has none I think might be germane. I would like to have Mr. Parmer read it and see if we can consent to offering it in evidence. The letter——

Mr. Parmer: If you can have the writer here I might.

Mr. Gair: Well, here is a man comes here and says he has authority to do a certain thing, and here is a letter from Washington says he has not.

Mr. Parmer: Well, he swears to it, and this man writes a letter to you or somebody else——

Mr. Gair: Well, I want to have the complete picture, although I don't think it is material one way or the other.

Mr. Parmer: I would be glad if you would put the man on the stand to question his authority.

Mr. Gair: Here is the letter that says he has none.

Mr. Parmer: That serves no point. I have already explained to Mr. Gair about that.

I would like to know if he will concede now, stipulate with me that from the beginning, or from a certain date subsequent to the death of Mr. Brady, Mrs. Brady has been receiving from the United States of America compensation payments pursuant to an award of the United States Employees' Compensation Commission.

Mr. Gair: I will concede that, if you will concede also that she must pay back out of any recovery in this action. That is under the same statute.

Mr. Parmer: Yes; in other words, if she recovers here she must first pay back the United States Employees' Compensation Commission the amount that they have paid her. [fol. 115] Mr. Gair: That is true. We will concede that. But so far as the present trial is concerned, it makes no difference. Whatever the lien of the Government is for that will have to be made good.

Mr. Parmer: It certainly means that if the United States has to pay the bill here it is one arm of the United States contributing to the other; that is what it amounts to.

Mr. Gair: Yes, but I don't agree to the first premise, that the United States Government has to pay the bill here for an award we may get in this trial, because they certify, and the Government has assented at least by making this payment for two years.

Mr. Parmer: I maintain that was brought about, your Honor, because I think your Honor is familiar with insurance methods, P. & I. accounts, and I think there is no doubt about it, because here our insurance is subject to a deductible, and there is a deductible here that is assumed ultimately and finally by the United States. I had offered to——

Mr. Gair: Besides, an eighty thousand dollar bond——

Mr. Parmer: Let me finish. I wanted to prove before your Honor by the last witness that the actual check in

payment of judgments rendered against both the United States and the agent is a Government check. It pays the judgment. And from there on, to prove that what the United States does is to submit its claim of which the judgment is a part to the insurance company, but it gets back only a part of what it pays, because there is a deductible, and therefore it is untrue to say that the Government is insured. That is irrelevant, anyway. The Government pays [fol. 116] the bill in the first instance, but then, as a matter of fact, it assumes a part of this obligation against its agent.

And I might say further, with regard to the claim that somebody employed by the United States Employees' Compensation Commission says that Mr. Collins is unauthorized to represent the United States, taking some of the curtains away from what is going on, I think your Honor can see that what is happening here is that the United States Employees' Compensation Commission, having paid the compensation, wishes to get it back from somebody and is not in the least interested whether it gets it back from the Government, the insurance company or anybody else, and therefore they question Mr. Collins's authority, but your Honor knows him, he has appeared before you many a time as a representative of the Government.

The Court: Yes.

Mr. Parmer: That is all my proof on the technical point, your Honor, that I have. I thought it would take longer, but your Honor overruled me.

(Discussion off the record.)

Mr. Parmer: Your Honor, I move that the action now pending against the Roosevelt Steamship Company, Inc., be dismissed on the ground that the Court has not jurisdiction of the subject matter. My motion is not based upon a contention that Roosevelt Steamship Company did not control and operate the vessel. I am assuming, for the purpose of this motion, that Roosevelt Steamship Company did operate and control the vessel and employed the members of the crew. I am assuming that, although I disagree with the decision of the Circuit Court of Appeals, but out of deference to that which it seems to hold. That [fol. 117] decision is now before the Supreme Court on a petition for certiorari, and if the petition is granted we

will hear further with regard to that. But I say now that, assuming that Roosevelt Steamship Company, by reason of this contract, employed the crew, that they were its agents, nevertheless this Court has not jurisdiction of the subject matter by reason of the decision of the Supreme Court in the case of Johnson v. Fleet Corporation.

In the case of Johnson v. Fleet Corporation, the United States was sued through the Fleet Corporation, and also the operating agents were sued as well, and the Supreme Court held there that since it appeared that the money which would be used to pay any judgment which might be rendered either against the agent or the Fleet Corporation would come directly or mediately from the Government, the exclusive remedy was the remedy afforded by the Suits in Admiralty Act.

That is the situation, essentially, here. The Suits in Admiralty Act provides that where, if the vessel were privately owned, a suit could be maintained *in personam* or *in rem* on account of the tort, the remedy must be—the remedy must be pursued under the Suits in Admiralty Act against the United States, and the Supreme Court in the Johnson case says it must be pursued only in Admiralty. That is both with regard to the agent and with regard to the United States itself.

That has been the constant and consistent line of decisions since. I can remember a case of my own in the Court of Appeals of New York where I adopted the same theory which is being presented here.

[fol. 118] The Court: Most of those suits were against the Shipping Board as constituted then, were they not? I recall, I think it was the second jury case that I tried when I went on the bench in 1929——

Mr. Parmer: Yes.

The Court: —was a recovery against the Shipping Board of $10,000.

Mr. Parmer: Right.

The Court: The Circuit Court of Appeals—just before it came up for argument the Johnson case came down, the judgment was set aside, and then there was the Enabling Act——

Mr. Parmer: It is true most of them were against the Shipping Board itself, but some of them, and one of those with which the Supreme Court was concerned, was in the Johnson case against the agent, and the Supreme Court particularly refers to the agent and says that it applies to the agent

as well as to the Government itself. But I was telling your Honor about the case that I had myself in the Court of Appeals, where I endeavored to present the same argument that is being presented against me here, and I was told I was wrong. That was the case of Shea v. United States Merchant Fleet Corporation and the Export Steamship Company, and I tried very hard to hold the agent, but they said the money comes eventually from the Government to pay this bill, it doesn't make any difference whether you sue the agent or the Government itself as represented by the Shipping Board Fleet Corporation.

The Court: If you make such a broad assertion as that the money eventually comes from the Government, I suppose that that would apply to almost every contract which is being [fol. 119] made at the present time, not limited to contracts with respect to the operation of vessels, but anything else.

Mr. Parmer: Well, not any contract which the Government may make; but any contract where the Government contracts with certain people to do its work as an agent it impliedly contracts to bear the expenses of the operation, and one of the expenses of running ships is the payment of judgments for tort.

The Court: I know, but if the test is that the money, as you say, the money eventually comes out of the Government, I say that that might very well apply to a tort suit against a munitions plant which is now devoting its entire attention to manufacturing munitions under the defense program, and paid entirely by the Government. In other words, that any recovery against that company for tort would ultimately come out of the Government. Now would that be the test?

Mr. Parmer: But your Honor uses "the money coming out of the Government" in a different sense——

The Court: Yes.

Mr. Parmer: From that in which I used it.

The Court: Well, you know of many large concerns which are getting their entire revenue today from operations under the defense program.

Mr. Parmer: Yes, that is true. But, after all——

The Court: Of course, they would not be sued in admiralty.

Mr. Parmer: No. It is perfectly true the money that I have today X may have tomorrow and Y may have the day after. In that particular sense you may say the money

comes from me, but that is not the sense in which the Su-
[fol. 120] preme Court uses the words here in the Johnson case. They meant it is the Government which eventually bears the loss, and that is the situation here, the Government eventually bears the loss. It pays its money in order to keep this agent whole. It is required to by the principles of agency, and as I endeavored to show, it recognized its obligation and in practice did it.

The Court: It all comes back to the construction of the statute and the construction, too, I suppose, of the contract.

Mr. Parmer: It does; and with respect to that I submit that the construction of the contract as exemplified by the Quinn decision is another matter in this case, because the Quinn case was not a Suits in Admiralty case. The Quinn case was a case that a ship ran into a bridge, it was a land tort, it was a case where the deceased could not have sued under the Suits in Admiralty Act. The point of exclusive jurisdiction under the Suits in Admiralty Act was not involved there.

The Court: Well, that was an Admiralty suit with a jury, anyway, the Quinn case.

Mr. Parmer: I don't know whether it was an admiralty suit, I am not sure. I know it was not an admiralty tort. It was not a case——

The Court: It was a suit in admiralty without a jury, as I recall it.

Mr. Gair: In any event, if your Honor please,—I don't want to foreclose the argument, it is interesting to listen to,—but the Johnson case and all the implications of the Johnson decision, everything Mr. Parmer is now saying, were raised in the affidavit before Judge Mandelbaum and were passed upon, and it would be the law of the case, as no appeal was taken.

[fol. 121] Mr. Parmer: As regards that, I have consulted Judge Mandelbaum's secretary, and he in turn, he advised me, has consulted the Judge, and I pointed out to him that the decision of Judge Mandelbaum had left the matter in a somewhat ambiguous shape, because he seemed to deal with the matter solely as if it were a question of control of the vessel, and I went to him and asked him if he thought it would serve a purpose to have re-argument in the matter, and he said that he thought that you would not be restrained in any way in forming an opinion with regard to this matter that was being presented to you.

The Court: Well, Judge Mandelbaum's decision has been completely superseded by the decision of the Circuit Court of Appeals, has it not? And that, as I read the opinion, is rather a sweeping decision.

Mr. Parmer: It is a controlling decision on the point, I fear.

The Court: As Judge Frank says, the plaintiff or the libellant, or the defendant as it was in that case, has two strings to his bow.

Mr. Parmer: Yes, that is true; and so far as that decision is concerned it is sweeping, he has two strings to his bow; he can sue the United States or he can sue the owner. That is true. Now the point is, we say here the man can sue the United States or he can sue the agent, but because it is a Suits in Admiralty case, an admiralty tort, he must sue the United States and the agent under the Suits in Admiralty Act in admiralty. The exclusive remedy against both is in admiralty. It is an entirely different point than was raised in the Quinn case, although at first blush you would think it is the same thing.

[fol. 122] The Court: Well, what advantage is there in suing in admiralty rather than in law?

Mr. Parmer: I could mention several.

The Court: I don't like to press that point. You recall that the Supreme Court at one time took a case in which I was involved and ultimately reversed it, largely because I think they wanted to emphasize the fact that there was no difficulty in cases at common law where juries were required because, as they stated, the judge, in the event of an excessive verdict rendered, had control of the situation.

Mr. Parmer: Well, ordinarily that would be the reason which I would assign to your Honor for not wishing to proceed at common law and preferring to proceed in admiralty, to escape a jury. There is no secret about such procedure. But that is not the reason here, primarily. The reason here is simply this, that this woman's rights against the United States are these: under the Compensation Act, where she has proceeded, she is allowed to get the weekly payments from the United States, which she has gotten for these years and will continue to get, and what she is trying to do is, by suing the agent at common law instead of in admiralty, is to get an extra amount which will be eventually paid by the United States, another branch of the

United States, insured in part but not in whole, which she could not do if she sued under the Suits in Admiralty Act, because if she sued under the Suits in Admiralty Act she would have to include the United States of America as one of the parties respondent, and the Act provides, or the Supreme Court has held, that you cannot get both compensation from the United States and sue the United States, [fol. 123] you must elect between one or the other; you may elect between getting compensation from the United States and suing a third party. Or you may sue, but you may not get compensation from the United States and thereafter sue the United States, because that is a double recovery. And by a device, in which I have to tear the cover of this thing away, it is only a device, they seek to get around that situation by suing the agent at common law, and so I present to your Honor the real facts of the situation, that the agent himself is to be indemnified by the United States, and, therefore, according to the Supreme Court decision, the suit must be brought in admiralty.

If it is brought in admiralty, that is the end of the case, and she goes on getting her compensation and nobody is hurt, but she can't get this extra amount. Indeed, the election which the law allows her does not allow her such an election. That is the essence of this point. That is why I press the point.

Mr. Gair: So far as we are concerned it is the same situation with the Federal Compensation Law as with the New York State Compensation law, which has now been brought into line with the Federal Compensation Law. In other words, you can get your compensation and start your third party action, but whatever has been paid to you in compensation must be paid back, and you don't get any further compensation after you have gotten your third party award, until that has been exhausted, and if the amount you got in compensation was less than you get in the common law action, you don't get any more compensation.

The Court: Well, according to Mr. Parmer you could not [fol. 124] bring the action at all without electing prior to bringing the action.

Mr. Gair: There is no such law as to election. He is talking of suing the United States Government. But so far as suing the third party is concerned, if it is in tort they have no standing to urge that at all. It is a new wrinkle to me

that the Government will have to indemnify its own agents for its agent's wrongs, when it is stipulated in the contract that the agent shall not commit that wrong.

Mr. Parmer: Your Honor, this is not indemnification for the agent's wrong, it is indemnification for the agent's liability for the wrong of some member of the crew, and that is an entirely different thing. It is a vicarious responsibility.

Mr. Gair: A crew selected by the agent.

Mr. Parmer: That makes no difference. There is no wrong, there is no breach of a contract here by the Roosevelt Line. There is some liability that is to be determined here, because it is a principal, it is said to be a principal.

Mr. Gair: How else can an agent ever act for its corporation, except through the crew on a boat?

Mr. Parmer: Well, there have been decisions of this Circuit illustrating that. For instance, the recent case of the Morro Castle, where there was privity on the part of the corporation by reason of the managing officers. There is one case. But there is here no question of privity, it is just some act on the part of some bo'sun or officer of a ship for which, if there is a judgment against the Roosevelt Line, it will be responsible.

Now it is of the essence of my argument that I recognize that an agent can be responsible for his tort. Of course [fol. 125] he can be responsible for his tort, and he can also be responsible for the tort of his sub-agent, that is viewing him as a principal, and it is with regard to this latter that we are concerned here, and the plea of Mr. Gair that this is a suit against a third party is really specious. It is nominally a third party, but by reason of the obligation of the United States to indemnify and to pay its bill, under the decision of the Johnson case, it is not really a third party at all, it becomes the United States.

In other words, to put it in colloquial language, this is the United States' baby, because it must pay the bill, and that is what it is essentially, and what the complainant is doing is electing, but not electing at all, it is first getting compensation from the Government with one hand and with the other hand getting a judgment against the United States, which cannot be done.

Mr. Gair: Well that certainly shows the power of speech, that we have taken this plain contract, and, by this talking

about it, have wound it into such a form, and it is so distorted as not to bear any semblance to the contract. We are not suing the Government, and the Government is not called upon, so far as our contract here is concerned and the Government's relationship, to do anything. It said to this agent, "We are giving you the ship, you operate it, you select your own crew with first officers, we have to O. K. them but they are your officers; so far as the equipment is concerned, you must inspect it, you must keep it in reasonable repair and indemnify us". That is what this contract says, by the big United States, "and put up a bond of $80,000." Then they come up and give the person a rotten [fol. 126] ladder and the ladder breaks and the person falls down and now they say we are suing the Government, and I think that is just juggling with words.

The Court: I don't think there is anything I can do about it. After all, I am pretty well circumscribed by the decision of the Circuit Court of Appeals in the Quinn case, and I think this question is essentially the question presented there, and it will have to be resolved by the Supreme Court of the United States.

Mr. Parmer: Well if it were the same question, or if I thought it were the same question, your Honor, I would not raise it before your Honor.

The Court: I understand.

Mr. Parmer: After all, here is this Johnson case that has been good law, and I would ask your Honor to read it again, because the agent——

The Court: I have read it a good many times, and it goes back now for at least 11 years, and so far as I am concerned I have had a good many cases on it prior to the time the decision came down.

Mr. Parmer: Does your Honor see what is going to happen, so far as suits under the Suits in Admiralty Act are concerned?

The Court: Yes, I see.

Mr. Parmer: Then the decision of the Supreme Court in the Johnson case is really rendered meaningless. If they can sue the agent it makes no difference.

The Court: Yes, but the Circuit Court of Appeals has been responsible for that, if there has been any such result as you say.

Mr. Parmer: Well, perhaps your Honor thinks that the [fol. 127] Quinn case was a case involving a maritime tort.

The Court: I take your word for it that it was not.

Mr. Parmer: They hit a bridge.

The Court: They hit a bridge, yes.

Mr. Gair: Going through a canal.

Mr. Parmer: That is right. They hit a bridge, and that is a land tort; no remedy against the United States under the Suits in Admiralty right there, and it is only where the remedy is afforded by the Suits in Admiralty Act that it is exclusive, and there it was not, so the point I am raising could not be raised there.

The Court: It is not an admiralty suit at all.

Mr. Parmer: No, it is not.

The Court: I didn't know how that suit got before Judge Moscowitz. That was a suit without jury, because it appeared that Judge Moscowitz said they might submit findings of fact and conclusions of law.

(Further discussion, not reported.)

The Court: I don't think there is any use prolonging this discussion at this time. I will deny the motion and give you an exception.

Mr. Parmer: Very good.

(Short recess.)

Mr. Parmer: Your Honor, in connection with the motion to dismiss on the ground of lack of jurisdiction, I want to have marked for identification what purport to be certain vouchers for the payment of bills incurred in the operation of the steamship Unicoi during the voyage which was end- [fol. 128] ing at the time of the accident in the Brady case.

The Court: You want to incorporate that as part of the offer which you made?

Mr. Parmer: Yes, I do.

The Court: All right. They will be marked for identification.

(40 vouchers and 1 payroll sheet marked Defendant's Exhibit C for identification.)

Mr. Parmer: And I also want to offer, in connection with this same offer of proof, for identification only, the vouchers for the payment of a judgment against the United

States of America and Roosevelt Steamship Company in the District Court of the United States for the Eastern District of Pennsylvania, together with the vouchers for the legal services rendered in defense of both the United States and the Roosevelt Line.

(Marked Defendant's Exhibit D for identification.)

Mr. Parmer: Your Honor, I have two other witnesses, whose testimony will be on the merits, and I think we might have the jury recalled.

(Jury recalled at 11.52 a. m.)

JOHN McCARTHY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Parmer:

Q. Mr. McCarthy, how old are you?
A. 38.
Q. And by whom are you employed?
A. American President Line.
[fol. 129] Q. Is that the successor of the Dollar Line?
A. Yes, sir.
Q. And how long have you been employed by them?
A. Almost two years.
Q. And what is your job?
A. Clerk.
Q. What was your employment before you worked for the American President Line?
A. Before that, American Pioneer, as clerk.
Q. Was that one of the companies associated with the United States Lines?
A. Yes, sir.
Q. And what was your job there?
A. Clerk.
Q. And what do you do as clerk?
A. Assistant timekeeper.
Q. Did you know Mr. Brady, the Customs inspector, whose widow is bringing this case?
A. I did know him in a way, yes, sir.

Q. When you say "in a way", will you describe what you knew about him?

A. I knew him because at times I had to go into his office and talk to him about different papers, and so forth.

Q. Where did he work in connection with your work as a clerk—what pier did you work at?

A. Pier 58.

Q. Now, did you see him on the day that he had his accident?

A. Yes, sir; I did.

Q. Will you tell us where, and about what time of day you saw him, and under what circumstances?

A. The only thing I can say is that I saw him in the morning right after the accident.

Q. Yes.

A. I would not say how long after, because I don't recall; it is a couple of years ago, you know.

Q. Yes.

A. So he came in the office and reported that he was injured, and I made the report, I made the regular report out.

Q. What did Mr. Brady tell you about what injury he had received?

A. So far as I can recollect, he just told me he was injured in his leg, in the calf of his leg.

[fol. 130] Mr. Gair: If your Honor please, I move to strike out the answer, upon the ground it is not given with sufficient definiteness.

The Court: Overruled.

The Witness: Well, it is definite enough in this way, that the man came in and showed me the injury he received.

Q. Well, what did he show you?

A. He lifted up his pants, the leg of his pants, to show me exactly what damage was done.

Q. Well, did you see something there when he lifted——

A. I seen it—I saw a bruise there.

Q. Did he unbutton any other part of his clothing?

A. Absolutely not, sir. He was just lifting up the leg of his pants.

Q. Did you make a report?

A. I made a report, yes, sir. I haven't seen the report since, and I don't know exactly what I put on it, outside of the injury to his leg.

Q. I see. I will just show you this and ask you if that refreshes your recollection as to whether that is a copy of it?

A. Yes, sir.

Q. Is that it?

A. Yes, sir; that is the report, because I sent him up to the doctor, I told him to go to the doctor and he said he did not have to go to the doctor.

Q. What doctor are you referring to?

A. I am referring to Dr. Lenahan, the ship's, or the company's doctor.

Q. Where is he located?

A. He was located at Pier 61, upstairs; or if he did not want to go that far we had Dr. Glagg at Pier 58, but I don't think Dr. Flagg was there at the time; I am not certain of that, sir.

Q. Is there a medical department at Dr. Lenahan's?

A. There is a medical department there; yes, sir. And Dr. Flagg has a medical department also.

[fol. 131] Q. Do you recall more precisely about what time you saw him?

A. I will tell you frankly it was before noon.

Q. Did you see him thereafter at any time during the day?

A. That day, if I recall correctly, I think it was a Saturday.

Q. Yes.

A. And we go home at noontime. I am pretty sure of that now.

Q. Yes.

A. So I don't recall seeing him after that.

Mr. Parmer: I recognize I have no right to offer this without your consent.

Mr. Gair: I do not consent to it. He testified.

Mr. Parmer: Very good. That is all.

Cross-examination.

By Mr. Gair:

Q. You were in the office, and the office that you were in was at the United States Lines?

A. Yes, sir.

Q. Was this the office to which complaint of injury being sustained was properly made with respect to the Roosevelt Steamship Company?

A. Right, sir; at Pier 58.

Q. In other words, the office of the owners of the Roosevelt Steamship Unicoi is the same office as the United States Lines?

Mr. Parmer: I object to that, your Honor, unless there is proof by a qualified person.

The Court: I will let him testify to that if he knows.

Mr. Parmer: All right.

Q. The office of the United States Lines is the office of the owners of the steamship Unicoi?

A. So far as I am concerned, we were working for the American Pioneer Line.

Q. Well, in that office——

A. At Pier 58.

[fol. 132] Q. At the office on Pier 58, working for the American Pioneer Lines, were you properly charged with the duty of making reports of injuries sustained on the steamship Unicoi?

A. On Pier 58.

Q. Yes; and you were told how it happened?

A. Yes, sir.

Q. By Mr. Brady?

A. Yes, sir.

Q. You heard about this ladder and what had occurred?

A. Right.

Q. When he told you about the injury, or showed you his leg, do you remember what the nature of the injury was then, what you actually saw?

A. I actually saw a bruise.

Q. And do you remember the extent of it?

A. Well, in what way, sir?

Q. I mean was it large, as big as a nickel or a quarter, or how large?

A. No, it wasn't; it was not large enough for him to go to the doctor.

Q. You suggested that he go and see the doctor?

A. I suggest that to anybody that is injured.

Q. And have you any recollection as you sit here now of the extent of the bruise, how large an area it covered, whether it was as big as the palm of your hand or less?

A. No; I would say it covered about an inch or an inch and a half.

Q. Where as it located?

A. Right around his leg, which leg I don't know.

Q. I wouldn't expect you to remember that. Was it below the knee?

A. Below the knee.

Q. And did he point to any other part?

A. No, sir.

Q. He just raised up and said, "Look what happened to me"?

A. Right.

Q. All his talk with you about this accident was a few minutes?

A. Oh, about five minutes.

Mr. Gair: That is all.

[fol. 133] (Testimony of Dr. Irvin Balensweig omitted.)

The Court: Anything further?

Mr. Parmer: No, sir.

The Court: That is the defendant's case. Have you any rebuttal?

Mr. Gair: No, I do not.

The Court: All right. Recess until a quarter past two.

(Recess to 2.15 p. m.)

Afternoon Session

Motion for Dismissal and Directed Verdict and Denial Thereof

Mr. Parmer: I renew the motion made at the end of the plaintiff's case, and I also move, further, for a dismissal and a directed verdict, on the ground that there is no proof here of any invitation on the part of the defendant or of anybody else, for that matter, to the deceased to use the particular ladder on which he was at the time.

The Court: I think that is all a question of fact. I will deny the motion and give you an exception.

How about the age of the plaintiff?

Mr. Gair: I have not been able to find anything on that, so far as I can learn.

The Court: She was 62?

Mr. Gair: And you were telling me about the complaint saying she was 61. At the time the action was actually commenced I am informed she was 61, but at the time of her husband's death she was 57.

The Court: I don't remember what she said, but I have got it 57.

Mr. Gair: 58 I think she said she was at the time of her husband's death.

[fol. 134] The Court: 57; but I may have gotten it wrong. Ask her what it was.

Mr. Gair: Mrs. Brady, what was your age at the time of your husband's death?

Mrs. Brady: 57.

Mr. Gair: Just 57?

Mrs. Brady: Yes.

The Court: 57. Then I did have it right in my notes.

Mr. Gair: It is agreed between the attorneys that Mr. James A. Brady, the deceased, would have been compelled to retire at the age of 70, had the right optionally to retire at the age of 68, but that if he retired at the age of 70 he would then be retired at the rate of $1,200 a year.

(Mr. Palmer summed up to the jury on behalf of the defendant.)

(Mr. Gair summed up to the jury on behalf of the plaintiff.)

(Short recess.)

Charge of the Court

The Court (Coxe, J.): Members of the jury: this is an action by Mrs. Brady as administratrix of her deceased husband's estate, to recover against the Roosevelt Steamship Company, Inc., damages for the alleged wrongful death of her husband. The complaint, for procedural reasons, has divided the claim into two parts, or, as they are described in the complaint, separate causes of action; one for the alleged pecuniary loss sustained by Mrs. Brady as a result of the death of her husband, and the second alleged

cause of action for the alleged pain and suffering sustained by her deceased husband during the period from July 9, 1938, to the time of his death on July 20, 1938. Those two separate causes of action have to be considered separately, [fol. 135] inasmuch as they cover entirely different subjects, both, of course, relating to the alleged injury.

In both causes of action it is alleged that the deceased was a Customs inspector employed by the United States Government; that on July 9, 1938, he was ascending a ladder on the side of the steamship Unicoi, operated by the defendant steamship company, which at the time was located at Pier 58, North River, in this city, when a rung on the ladder broke and he sustained injuries from which he subsequently died; that the ladder was defective or out of repair, due to the negligence of the defendant, and that as I have already stated, the deceased died as a result of this alleged negligence of the defendant corporation.

The answer of the defendant is, in substance, a general denial. There are, it is true, other legal defenses which are set up in the answer, which are of no particular concern to the jury at this time.

The testimony is not in serious dispute, especially with respect to the occurrence of the accident. The deceased was, at the time of his death on July 20, 1938, 62 years of age, and Mrs. Brady has testified that he had at that time been in the Customs service for 38 years and was in receipt of a salary of $2,900 a year. He left surviving him his widow, Mrs. Brady, who at the time of his death was 57 years old, and two minor children, one a boy 20 years of age, and the other a girl 15 years of age.

Mrs. Brady also testified that her husband supported the family, gave to her $25 a week for the ordinary maintenance of the family, provided for the education of the children and, in general, contributed toward the support of the family.

There was testimony, which I think is substantially uncontradicted, to the effect that the deceased started to go up a ladder at about 9 a. m. on July 9, 1938, at Pier 58, [fol. 136] North River, where the steamship Unicoi had just docked; that he had gone up the ladder about 13 rungs when one of the rungs broke and, according to the testimony of the witness Dankelman, he was seen swinging and trying to obtain some kind of a foothold on the ladder. He did not fall to the dock or into the water, but apparently

found his footing on the rung immediately underneath the one which had broken, or some lower rung in the ladder.

There was also testimony to the effect that the rung on which the deceased was standing, broke in the middle, and the condition of the rung was characterized, as I remember, by the witness Lyons, as "rotten."

The deceased, after he had found his footing, proceeded up the ladder and over the bulwark and onto the deck, and apparently completed the work that he was engaged in when he proceeded to go on board the vessel.

There is further testimony that sometime in the morning the deceased went back into the office and complained of feeling some pain.

Mrs. Brady has testified that between 3 and 4 o'clock in the afternoon of July 9, 1938, which was a Saturday, the deceased came home and complained about feeling pain in his side, and that at 8 o'clock he succeeded in reaching Dr. Lopez and was examined by him for his injuries. I am not going to attempt in any way to review the medical testimony in this case. You have heard the doctors called on behalf of the plaintiff, namely Drs. Lopez and Adams, and also the doctor called this morning on behalf of the defendant, Dr. Balensweig.

Dr. Lopez testified that on the first examination, on the evening of July 9, 1938, he diagnosed the case as contusions and abrasions, and did not at that time think that there was anything wrong with the appendix. The deceased stayed either in bed or at home during the following week, and on July 16, 1938, he went to the hospital, was [fol. 137] examined further, and on the evening of that day was subjected to an operation.

Dr. Lopez testified that after the operation had been made he then saw at once that there had been some peritonitis and that the matter was serious.

The deceased died in Yonkers on July 20, 1938. That in substance is the story as it has been narrated here by the witnesses, and I am not undertaking to go into it in any detail, and you will, of course, understand that I am not attempting to cover it in any detail.

Questions which have been raised by the defendant are as to whether there was any negligence which resulted in the death of the deceased, and then as part of that main question there is this subsidiary question which has been raised by the defendant with respect to whether the de-

ceased was justified in using this ladder at the time he attempted to board the steamship Unicoi. The second question is whether the death of the deceased was proximately caused by the injuries which the plaintiff says the deceased sustained on July 9, 1938 when the rung on the ladder broke.

Now with respect to the first question, namely, of negligence, the story has come largely from the witnesses called by the plaintiff, that is by Mrs. Brady as administratrix of her deceased husband's estate, and there has been substantially no contradiction in that story.

On the subsidiary question as to whether the deceased was justified in using this ladder, there was testimony by the witness Lyons, who was also a Customs inspector, associated with the deceased on this particular job, to the effect that at various times in the past he had used ladders of this kind in boarding vessels which had come in from outside, and there is no testimony to the contrary in that respect. Neither is there any testimony to indicate that at any time the steamship company ever questioned the right [fol. 138] of Custom inspectors to proceed in their line of duty in the way that it has been shown that the deceased proceeded at the time of his injury.

The other question, which has been argued very fully by counsel, concerns the medical testimony, and I think that you are in a much better position to determine that question than I am, and I doubt very much whether I can give you any help by any comment whatever. It does not seem, however, to be very seriously disputed that the deceased did fall, and that there was some injury of some kind, and it is of course true that on the night of July 9, 1938 he did go to Dr. Lopez, who has testified very fully here at the trial.

However, as I have stated, that is a question which the jury will have to determine for themselves.

If you find that the deceased was injured as a result of the negligence of the defendant, and that that injury resulted in his death, you then come to the question of damages, and in a case of this kind the law justifies this splitting up, as I have already indicated, of the claim into these two parts, and I should like very briefly to comment upon the first cause of action, or the first part in which the plaintiff is claiming merely for the pecuniary loss which she and her dependent children have sustained as the result of the death of her deceased husband.

In that cause of action there are first these out of pocket expenses, and there are only three of them in the record in the case, namely, the funeral expense, $480; the expense of the Yonkers Hospital, $46; and then the bill of Dr. Lopez of $300, making a total of $826.

The second part of the claim relates entirely to this question of the actual pecuniary loss sustained by Mrs. Brady as a result of the death of her deceased husband. And on that part of the claim it is the law that if she is entitled to recover in this first cause of action she may recover for the benefit of herself and her dependent children such a sum as you may determine to be the present [fol. 139] cash value of the reasonable expectancy of pecuniary advantage to her during her widowhood and while dependent, and the pecuniary advantage to the two minor children while dependent and until they reach the age of 21 years.

I don't know whether you understand that language, but in substance all it means is that she is entitled to recover on that cause of action the present cash value of this reasonable expectancy for her benefit and for the benefit of her minor children.

The testimony, as I recall it, on that phase of the case is that, according to the mortality tables, the deceased, Mr. Brady, had an expectancy at the time of his death of 12½ years, and that Mrs. Brady was at that time 57 years of age; and I need not go over the testimony which I have already commented on with respect to his earnings. How much she might, for her benefit and the benefit of her children, reasonably expect during that period is largely a question for the jury to determine. Obviously, she could not reasonably expect the full $2,900, because he would require something for his own maintenance and for his own expenses, but there must be some figure less than that which the jury might determine that she would be justified in expecting. And then there is this additional limitation, which was covered by a stipulation at the end of the trial, to the effect that in the Government's service Mr. Brady, the deceased, would have had to retire at the age of 70, at which time he would receive a pension of $1200, so that there would then again be some limitation in that respect, although of course it would not preclude him, I suppose, from the possibility of some expectation that he might obtain some other employment.

So much for the damages with respect to the first cause of action.

[fol. 140] On the second cause of action, which I have already stated is merely for pain and suffering of the deceased, Mr. Brady, during the period of July 9, 1938 to the time of his death on July 20, 1938, that period of roughly eleven days, that is a question entirely in the hands of the jury. And there is, of course, some testimony here in the case with respect to that pain and suffering, but as I have already stated, there should be separate verdicts with respect to the first and second causes of action.

The plaintiff in this action is required to prove her case by a fair preponderance of the evidence, and that burden follows her throughout the trial. The rulings of the Court during the trial were on questions of law, and are of no concern whatever to the jury, and should not influence you one way or the other in so far as your deliberations are concerned. Your verdict in this case may be, on the first cause of action, for the plaintiff for such amount as you think plaintiff is entitled to for the death of her husband, and included in that are these three items of expense aggregating in amount $826. Or it may be for the defendant on the first cause of action. Your verdict on the second cause of action may be for the plaintiff for such an amount as you may determine that she is entitled to, to cover the pain and suffering, if you find that there was such pain and suffering, of the deceased, Mr. Brady, during this period of eleven days prior to his death. Or it may be for the defendant.

Are there any requests to charge, or any exceptions to the charge?

Mr. Gair: There are no exceptions. I ask your Honor to charge, in line with the memorandum handed to your Honor, that if the jury find that the defendant's negligence was responsible for the deceased's initial injury but that his death was caused or contributed to by——

The Court: Well, I don't think I need charge that, but all it amounts to is that if they find that the death was caused, [fol. 141] as we say, proximately—I say caused—by this particular injury, through the negligence of the defendant, then there may be a recovery.

Mr. Gair: That is not the point I was coming to. But if the doctor's malpractice, as is claimed by Mr. Parmer,

may have caused his death, if the jury find that the initial injury was caused by the defendant's negligence, then the defendant is nevertheless responsible for the death of the deceased.

The Court: I don't like to go into the question of malpractice. I see what you mean, but I think what I have stated covers the situation. However, if the jury find that Dr. Lopez made a mistake and they also find that the deceased's death was caused by this injury due to the negligence of the defendant, than I——

Mr. Gair: That the doctor's mistake will not excuse the defendant.

The Court. No. However, I leave the whole question to the jury. Have you anything, Mr. Parmer?

Mr. Parmer: No exceptions or requests.

The Court: Good. It is now a quarter past four. I wish you would listen to this oath. It may be of use to you some day.

(A bailiff was sworn, and the jury retired in his care at 4:15 p. m.)

The Court: If there are any exhibits you need, you may send for them; otherwise they won't be sent to the jury room.

(At 6:30 p. m. the jury addressed a note to the Court, reading: "Your Honor, would our finding in the second action be 'No damages', or what is the proper wording?" Signed "Foreman". To which the Court replied: "If the jury finds that the plaintiff should not recover anything on the second cause of action it should report 'For the defendant on the second cause of action'.")

The Court: Counsel state they have no objection to the note from the jury or to the reply.

[fol. 142] VERDICT

(At 6.42 p. m. the jury reported they had agreed upon a verdict, and were returned to the courtroom at 6.47 p. m.)

(Roll called; all present.)

The Clerk: Mr. Foreman, have the jurors agreed upon a verdict?

The Foreman: We are.

The Clerk: And how say you?

The Foreman: We find for the plaintiff in the first cause of action in the sum of $19,000, which includes the three amounts mentioned. In the second cause of action we find for the defendant.

The Clerk: Members of the jury, listen to your verdict as it stands recorded: We find for the plaintiff in the first cause of action in the amount of $19,000, which includes the three amounts mentioned. We find for the defendant in the second cause of action. And so say you all.

The Foreman: Yes, sir.

Motion to Set Aside Verdict and Denial Thereof

Mr. Parmer: Your Honor, I move to set aside the verdict on the first cause of action, on the ground that it is contrary to the law, and on all the exceptions taken during the trial, and also on the grounds stated in Section 549 of the Civil Practice Act, except on the ground of inadequacy.

The Court: I will deny the motion. I can't say that that is an excessive verdict.

Mr. Parmer: And I also move to set aside the verdict as a whole, on the ground that they are inconsistent with each other.

The Court: No, I don't think that, either. I think they are quite consistent.

Mr. Parmer: Exception.

The Court: All right.

Thank you, members of the jury.

[fol. 143] In United States District Court

Note Re Exhibits

Plaintiff's Exhibits 1 and 3 are not printed.

Plaintiff's Exhibit 2 is the same as the operating agreement printed at page 28 in support of the motion to dismiss.

Defendant's Exhibits A and B are not printed.

Defendant's Exhibits C and D are not printed but the originals (consisting of numerous bills and vouchers) are permitted to be handed to the Court at the argument.

IN UNITED STATES DISTRICT COURT

JUDGMENT—October 25, 1941

The above entitled action having been duly tried before Mr. Justice Alfred C. Coxe and a jury at a Stated Term of the United States District Court for the Southern District of New York, on the 17th, 20th and 21st days of October, 1941, and the jury having duly rendered a verdict in favor of the plaintiff, Margaret Brady, as Administratrix of the goods, chattels and credits of James P. Brady, deceased on the 1st cause of action against the defendant Roosevelt Steamship Company, Inc., in the sum of $19,000.00, and the interest on the said amount from the 20th day of July, 1938, the date of the decedent's death until October 22, 1941, being $3,714.50 and a verdict for [fol. 144] the defendant, on the 2nd cause of action, and the costs of the plaintiff having been taxed in the sum of Forty-five and 50/100 Dollars.

Now, On Motion of Klein, Kinsley & Klein, attorneys for plaintiff it is

Adjudged that the plaintiff, Margaret Brady, as Administratrix of the goods, chattels and credits of James P. Brady, deceased do recover of the defendant, Roosevelt Steamship Company, Inc., of 1 Broadway, New York City, the sum of $19,000.00 plus the sum of $3,714.50 interest thereon, plus the sum of $45.50 costs as taxed, making in all the sum of $22,760.00 and that the plaintiff have execution therefor, and the defendant have judgment dismissing the second cause of action.

Dated, New York, October 25, 1941.

George J. H. Follmer, Clerk of U. S. District Court, Southern District of New York.

[fol. 145] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 18, 1941

SIRS:

Please Take Notice that Roosevelt Steamship Company, Inc., defendant herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from so

much of the judgment entered herein on the 25th day of October, 1941, as provides for the recovery by the plaintiff in the above entitled action from the said defendant of the total sum of $22,760.

Dated, New York, November 15, 1941.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Office and Post Office Address, 120 Broadway, Borough of Manhattan, City of New York.

To: Klein, Kinsley & Klein, Esqs., Attorneys for Plaintiff, 342 Madison Avenue, Borough of Manhattan, City of New York.

[fol. 146] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

STIPULATION AND ORDER AS TO EXHIBITS

It is Hereby Stipulated and Agreed that the originals of defendant's Exhibits "C" and "D" marked for identification, consisting of numerous bills and vouchers showing payments by the Maritime Commission, may be handed up to the Court at the argument of the above entitled appeal and that they need not be reproduced in the record on appeal.

Dated, New York, January 26, 1942.

Klein, Kinsley & Klein, Attorneys for Plaintiff-Appellee. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant-Appellant.

So ordered, January 29, 1942.

Learned Hand, U. S. C. J.

[fol. 147] UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, February —, 1942

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant. Klein, Kingsley & Klein, Attorneys for Plaintiff.

[fol. 148] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 149] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1941

No. 252

(Argued April 15, 1942. Decided May 16, 1942)

MARGARET M. BRADY, as Administratrix of the Goods, Chattels and Credits of James P. Brady, Deceased, Plaintiff-Appellee,

against

ROOSEVELT STEAMSHIP COMPANY, INC., Defendant-Appellant

Appeal from a judgment, of the District Court for the Southern District of New York, for the plaintiff in a suit to recover for the death of her intestate as the result of injuries received while attempting to board a vessel. Reversed.

Before Augustus N. Hand, Chase and Clark, Circuit Judges

Klein, Kinsley & Klein, Attorneys for Plaintiff-Appellee; August P. Klein and Benjamin H. Siff, of Counsel.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Roosevelt Steamship Company, Inc., Raymond Parmer, Vernon Sims Jones, of Counsel.

[fol. 150] CHASE, Circuit Judge:

The appellee's intestate, a United States customs inspector, was injured when attempting, in the performance of his duties, to board the S. S. Unicoi on the morning of July 9, 1938 when that vessel was docked at Pier 58, North River. His injuries, caused by the breaking of one of the rungs in a defective ladder which had been lowered from the ship for his use in coming aboard, were so serious that they caused his death in the Yonkers General Hospital at Yonkers, N. Y., on July 20, 1938. The appellee, his widow, was duly appointed his administratrix.

The S. S. Unicoi was a vessel owned by the United States Maritime Commission which was operated for the Commission by the appellant, the Roosevelt Steamship Company,

Inc., under a contract with the Commission. The Roosevelt Steamship Company, Inc., was, and is, a private corporation, none of its stock being owned directly or indirectly by the United States.

The appellee sued the Roosevelt Steamship Company, Inc., in the New York Supreme Court to recover the damages, caused by her husband's death, for the benefit of herself and her children. That suit was removed by the appellant to the District Court for the Southern District of New York and there tried to a jury on the law side of the court after the denial of the appellant's motion to dismiss on the ground that the court had no jurisdiction because the appellee's remedy, if any, was exclusively under the Suits in Admiralty Act (46 U. S. C. A. §§741, 742). The only issue on this appeal is that of jurisdiction so raised and decided below.

The appellee relies upon our recent decision in *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2) 190, to show the liability of the appellant as the operating agent for the tort which caused the death of her husband. That is [fol. 151] not enough, however, to make that decision controlling here. The tort in the *Quinn* case was not maritime. *Smith & Son, Inc.* v. *Taylor*, 276 U. S. 179. Consequently no suit could have been maintained in admiralty against anyone because of it and our decision was without regard to what effect the Suits in Admiralty Act might have upon proceedings to recover the damages caused by a tort maritime. That is the kind of tort involved in this suit. *Vancouver S. S. Co.* v. *Rice*, 288 U. S. 445; *The Admiral Peoples*, 295 U. S. 649; *The Shangho*, 88 F. (2) 42.

That being so, the appellee was entitled to sue under the Suits in Admiralty Act. *Eastern Transp. Co.* v. *United States*, 272 U. S. 675. Nor can it be doubted that that statute provided the exclusive remedy in admiralty against the Commission or the United States. *U. S. Shipping Board Emergency Fleet Corp.* v. *Rosenberg*, 276 U. S. 202. It has also been settled just as definitely that an action in admiralty is the only available remedy against the United States or a corporation whose stock is wholly owned by the United States. *Johnson* v. *Fleet Corporation*, 280 U. S. 320.

Nevertheless the appellee insists that where a private corporation is the contracting operator of a vessel owned

by the United States, or by the Maritime Commission which is here to be treated as the United States, that private corporation is suable as it would have been were there no Suits in Admiralty Act to be considered.

In taking that position we think the appellee fails to realize the full significance of the decision in the *Johnson* case, *supra*. And it may be that this is so because too much regard has been given to the thought that if the appellee recovers the judgment will neither be against the government directly or indirectly nor will the United States be compelled to reimburse the agent for the damages it may pay as a result of its own negligence either by the [fol. 152] terms of the operating contract or by general principles of law. Restatement of Agency, § 440 (a). Granted that this is so, it is not decisive for the Suits in Admiralty Act goes beyond the mere protection of any pecuniary interest of the government. A prime purpose of the statute was to prevent the seizure in ports of the United States of vessels owned by the government or its wholly owned corporations in actions *in rem*. No distinction was made between seizures from a private operating corporation and from an operating corporation owned by the government. Whenever a suit in admiralty could have been maintained against the ship or the owner, if the ship had been privately owned and operated and it was a merchant ship, the right otherwise to sue was taken away and replaced by the right to sue the United States or its wholly owned corporation *in personam* but, at the election of the libellant, with all the advantages of a suit both *in personam* and *in rem*. The Act in terms provides that a vessel shall not be subject to arrest or seizure by judicial process in the United States if, *inter alia*, it is operated "by or for the United States or such corporation" and in § 2 the right to sue *in personam* as above is given. In the *Johnson* case, *supra*, it was held that "the remedies given by the Act are exclusive in all cases where a libel might be filed under it." In one of the appeals considered in that opinion the United States owned the merchant vessel "Coelleda" which was "operated for it by the Navigation Company as agent pursuant to an agreement made by the United States acting through the Shipping Board represented by the Fleet Corporation." Apparently the Navigation Company was in all material respects in the position of the Roosevelt S. S. Co., Inc., as the agent in

this instance. It and the Fleet Corporation were both sued at law by an injured seaman. In holding that the exclusive remedy was under the Suits in Admiralty Act, it was said that, "Putting the United States and the [fol. 153] Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation or other agents for enforcement of the maritime causes of action covered by the Act." We feel precluded from construing "other agents" under the principles of *eiusdem generis* as other agents whose capital stock is wholly owned by the United States and whose losses would be borne directly or indirectly by the United States by the fact that the operating agent of the "Coelleda" seems to have been just such an agent as was here sued and obviously was included in the phrase "other agents" as used in *Johnson* v. *Fleet Corporation, supra.* So, therefore, is this defendant. Compare *Shea* v. *Export S. S. Corp.*, 253 N. Y. 17, 170 N. E. 477.

Judgment reversed with directions to dismiss the complaint.

CLARK, *C. J.* dissents with memorandum.

CLARK, *Circuit Judge* (dissenting):

The Suits in Admiralty Act, 46 U. S. C. A. §§741, 742, is quite explicit in setting forth its apparent limits of applicability. By its first section it exempts from seizure or arrest vessels owned by the United States or a corporation with government-owned capital stock, or *operated by or for the United States or such corporation.* But the second section is carefully limited to the United States or such corporation; in terms it permits a libel *in personam* against them, which in *Johnson* v. *Fleet Corp., supra,* was held to be the exclusive remedy. Because in that case the Court, [fol. 154] in dismissing several claims clearly within the affirmative terms of the statute, included one for seamen's maintenance and cure against the Fleet Corporation and the operator—referred to only summarily as "other agents"—we have our present problem.

Did the Court deliberately plan to take away rights of litigants to sue generally in all cases against operators? In *Shea* v. *Export S. S. Corp., supra,* 253 N. Y. at page 22, the court says, however, that the accepted test is whether it sufficiently appears that "directly or mediately, the money required to pay a judgment against [defendants] would come out of the United States." That seems a rational stopping point for statutory emendation; but we pass it here. We are not dealing with operating expenses for which the United States must provide the money under the operating contract, but for wrongdoing—negligence—of the operator. In *Quinn* v. *Southgate Nelson Corp., supra,* we held the operator liable for negligence. If, as I believe, government liability is the controlling test, we cannot distinguish the *Quinn* case, because there the vessel was navigated into a bridge, while here a vessel at rest had a defective ladder to the wharf. Counsel suggested that the government in fact would provide reimbursement to the operator here; but that would seem favor, not right. This holding considerably extends the statute beyond anything yet directed by the court and deprives litigants of rights which, as seemingly here, may be most important. I doubt if we should so take the initiative.

[fol. 155] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of June one thousand nine hundred and forty-two.

Present: Hon. Augustus N. Hand, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

MARGARET M. BRADY, as Administratrix of the Goods, Chattels and Credits of James P. Brady, Deceased, Plaintiff-Appellee,

v.

ROOSEVELT STEAMSHIP COMPANY, INC., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs, with directions to dismiss the complaint.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 156] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Margaret M. Brady, as Administratrix, etc., v. Roosevelt Steamship Co., Inc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 4, 1942. D. E. Roberts, Clerk.

[fol. 157] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 158] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 269

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Simone N. Gazan. File No. 46,763. U. S. Circuit Court of Appeals, Second Circuit. Term No. 269. Margaret M. Brady, as Administratrix of James P. Brady, Deceased, Petitioner, vs. Roosevelt Steamship Company, Inc. Petition for a writ of certiorari and exhibit thereto. Filed July 31, 1942. Term No. 269 O. T. 1942.

(2959)

No. 269

Office - Supreme Court, U. S.
FILED
JUL 31 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

MARGARET M. BRADY, as Administratrix of James P. Brady, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SIMONE N. GAZAN,
Attorney for Petitioner,
One Broadway,
New York City.

AUGUST P. KLEIN,
BENJAMIN H. SIFF,
of Counsel.

ACKERMAN PRESS, Inc., 302 East 44th St., Phone Vanderbilt 6-1998

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

MARGARET M. BRADY, as Administratrix of the Estate of James P. Brady, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Margaret M. Brady, as Administratrix of the Estate of James P. Brady, deceased, respectfully prays a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Second Circuit entered on the 4th day of June, 1942 reversing a judgment for $22,760.00 in favor of Petitioner and against Respondent, as damages for the death by wrongful act of James P. Brady, and dismissing the complaint. This decision was upon the ground that the decedent's death, having resulted from a maritime tort, and this defendant being the opera-

tor of a government-owned merchant vessel, the exclusive remedy of plaintiff was against the United States under the Suits in Admiralty Act.

The decision was not unanimous. Judge Clark dissented in a vigorous and logical memorandum.

Brady v. Roosevelt S. S. Co., 128 Fed. (2d) 169.

The Circuit Court of Appeals entirely lost sight of the fact that the deceased, James P. Brady, was, at the time of his death, a Customs Inspector and a civil employee of the United States, and that his widow has accepted federal compensation (R. 342*). Therefore, his administratrix could not sue the United States under the Suits in Admiralty Act because all rights and remedies against his employer were waived when she elected to take, and accepted, compensation under the United States Employees' Compensation Act. His estate could not sue for damages.

Dahn v. Davis, 258 U. S. 421.

The decision that the United States should have been sued under the Suits in Admiralty Act is, therefore, utterly without force or effect.

Statement of the Case.

The United States, through the Maritime Commission, owned the merchant vessel "Unicoi". This vessel was one of a fleet which was operated under the trade-name of American Pioneer Line.

It was the intention of the Congress in passing the Merchant Marine Act of 1936 and in creating the Maritime

*Reference is to folios.

Commission, to establish an American merchant marine to engage in world-wide foreign commerce. The vessels were to be acquired by purchase or construction, and to be operated eventually by purchasers or charterers.

Title 46, U. S. C. A., § 1194, et sequi.

Pending a satisfactory sale or charter, it was provided that the Maritime Commission could have the vessels temporarily operated for it by "private operators".

Title 46, U. S. C. A., § 1194.

Acting upon this authority the Maritime Commission selected the Roosevelt Steamship Company as its "private operator" of the vessels of the American Pioneer Line, among which was the "Unicoi" (R. 86).

The contract between the Maritime Commission and the Roosevelt Steamship Company was in compliance with the above statute (R. 87) which required a "private operator", and consequently the contract designated the Roosevelt Steamship Company as the Managing Agent (R. 84). The contract recites (R. 89):

> "Whereas, the Managing Agent has indicated its willingness to undertake the *management and operation* of the Line. . . ." (Italics supplied.)

That part of the preamble definitely fixes the independent character of the operator, and it is emphasized by the following provisions (all italics supplied):

> A. "The owner hereby designates the Managing Agent as its Managing Agent to *manage, operate and conduct the business of the Line* . . . on behalf of the Owner . . . and under its supervision and direction" (R. 90).

B. "The Managing Agent shall *manage and operate* the said vessels under the trade name American Pioneer Line . . ." (R. 95).

C. "The Managing Agent agrees to *man, equip, victual, supply* and *operate* the vessels, subject to such restrictions and in such manner as the owner may prescribe . . ." (R. 99).

D. "The Managing Agent agrees to *conduct its operations* with respect to the vessels . . . in full compliance with applicable provisions of law, and particularly the Act, . . . and with due regard to *wage and manning scales* . . ." (R. 101).

E. "The Managing Agent shall . . . exercise reasonable care and diligence to maintain the vessels in a *thoroughly efficient state of repair*, covering . . . *tackle* . . . *equipment* . . . and will effect *maintenance and voyage repairs and replacements* . . ." (R. 107).

F. "The Owner shall provide . . . hull, machinery and port risk insurance, and *the Managing Agent shall provide*, for the account of the Owner and subject to its approval, *Protection and Indemnity*, and such other forms of insurance as the Owner may deem necessary" (R. 111).

G. The Managing Agent is obligated to provide a bond "to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the Managing Agent contained in this agreement" in the amount of $80,000.00 (R. 115).

H. "Any agents selected or appointed by the Managing Agent shall be solely the agents of said Managing Agent and not, in any respect, the agents of the Owner . . ." (R. 123).

I. "The Owner may terminate the agreement if (a) A voluntary sale by the Managing Agent of this agreement, or any interest therein, or an assignment . . . whereby the management or operation of the above described Line or vessels shall be divested from the Managing Agent . . ." (R. 124).

This agreement was substantially a bare boat charter of the vessels to Roosevelt Steamship Line, the Owner retaining such supervision only as would tend to safeguard and protect its properties.

The steamship "Unicoi" docked in New York on the morning of July 9, 1938 and immediately put over a long ladder from ship side to dock. It was the duty of Brady, the Customs Inspector, to promptly go aboard that vessel in the performance of his duties. While ascending the ladder a defective and rotton rung gave way under his weight; he dropped to the next rung below, still holding on with his hands (R. 252). He obtained a new footing and continued on up, boarded the vessel (R. 300) and attended to his duties.

From internal injuries sustained when his body dropped as the rung broke, he died on July 20, 1938.

His widow, as administratrix, brought a common law action under the death statute of New York and, upon trial, recovered a judgment of $22,760.00.

The defendant never questioned, on appeal, the negligence which caused the accident, and the resulting death, nor was any attack made upon the amount of the verdict.

The defendant urged by motion before trial (R. 30) and also upon the trial (R. 348) the contention that the court did not have jurisdiction of the subject-matter, because the accident was a maritime tort; the Roosevelt Steamship Company was a mere agent of the United States operating the boat, not on its own behalf but on behalf of the United States; that any judgment recovered would be paid out of the Treasury of the United States and, therefore, the

sole remedy was against the United States under the Suits in Admiralty Act.

At the trial the defendant assumed, for the argument, that the Roosevelt Steamship Company did independently operate and control the vessel and employed the members of the crew (R. 348) but contended that the judgment would have to be paid by the United States and, therefore, under the doctrine of *Johnson* v. *Fleet Corporation*, 280 U. S. 320, the sole remedy was under the Suits in Admiralty Act.

Both the formal motion before trial and the procedural motion at the trial were denied.

The defendant appealed this jurisdictional question and the Circuit Court of Appeals, by a two to one decision, reversed the judgment and directed that the complaint be dismissed, stating that the sole remedy was against the United States under the Suits in Admiralty Act.

Petitioner (appellee below) now seeks certiorari to review that decision.

Jurisdiction.

The jurisdiction of this Court to entertain this petition and to grant the same, is provided by Section 347 of Title 28 of the United States Code.

Definitely involved are the following:

a. A construction of the Suits in Admiralty Act, and its application to an independent, private corporation operating a government owned merchant vessel under the mandate of the Merchant Marine Act of 1936 which specified that the operation was to be by private operators.

b. The effect of the Brady decision on the Federal Employees Compensation Act.* The Brady case holds that

*See Exhibit "A", annexed to the Petition.

any tort claim against the operator of a government merchant vessel must be against the United States in admiralty under the Suits in Admiralty Act. That Act provides that the final judgment must be paid by the United States (46 U. S. C. A., Sec. 748).

The Employees' Compensation Act (5 U. S. C. A., Sec. 776) provides for the assignment of claims against a "person other than the United States", thereby authorizing a suit by the United States or the Compensation Commission, or the personal representative of the deceased, against such third person to collect the damages recoverable for the tort. Does the Brady decision, holding that for maritime torts on a government vessel, the only party suable is the United States, nullify so much of the Compensation Act as authorizes a suit against a third party to recover damages? That Brady decision would require the United States, as assignee of its civil employee, to sue the United States, as vessel owner!! The tort feasor—the guilty party, with a liability bond to indemnify it, would go free!

The Questions Presented.

The Circuit Court of Appeals correctly held that, both under the contract and the general principles of law, the United States would not be bound, or required, to pay the judgment recovered against the agent, based upon the affirmative and active negligence of the agent.

Therefore, we need not concern ourselves with the case of *Johnson* v. *Fleet Corporation*, 280 U. S. 320, and its application to the testimony of Mr. Collins (R. 328) that the United States would have to pay the judgment, which was somewhat remarkable testimony in view of the express provision in the contract for the procurement of liability insurance by the agent to indemnify against loss or damage, and the fact that no attorney for the United States appeared in the case, which was defended only by the Roosevelt Steamship Company's attorneys.

The Circuit Court of Appeals held squarely that, since the tort was maritime, *ipso facto*, the sole remedy was under the Suits in Admiralty Act, if at the time the vessel was being operated "by or for the United States or such corporation".

Therefore, the questions which are presented by this petition are:

1. Where the Maritime Commission turns over government merchant vessels to a private operator, under statutory mandate, which operator becomes the Managing Agent charged with the duty to manage and operate the vessels; man, equip and supply them; keep the appliances and equipment in good order and repair and to provide P. & I. Insurance against personal injury and death claims, and such Managing Agent permits a ship's ladder to become defective, dangerous and unseaworthy so that, when placed from ship to dock, a rotten rung breaks when a Customs Inspector starts to ascend the ladder, and he sustains fatal injuries as a result of this maritime tort, can the administratrix of such deceased government employee sue the responsible Managing Agent at common law, under the state death statute, for damages due to its own negligence, even though the Managing Agent was operating the vessel for the United States, or does the Suits in Admiralty Act afford the exclusive remedy, since the death was attributable to a maritime tort?

2. Under the circumstances stated, would the Suits in Admiralty Act still afford the only remedy despite the fact that the widow of a civil employee of the United States has elected to take, and has actually accepted, the compensation provided by the Federal Employees' Compensation Act, and thereafter cannot sue his employer?

3. Does the bare fact that an independent agent, who operates a government merchant vessel for the United States, and who is guilty of a maritime tort which inflicts fatal injuries, *ipso facto* relegate such claimant exclusively to redress, if any, under the Suits in Admiralty Act, irre-

spective of the fact that the negligence is solely that of the agent, and such agent is personally liable for the resulting damages?

Opinions Below.

The plaintiff below relied on the case of *Quinn v. Southgate-Nelson Corporation*, 121 Fed. (2d) 190,* a decision by the Second Circuit. In that case Quinn was a government employee, working as a bridge-tender on a government bridge. The steamship "Waukegan" was government-owned but was operated by Southgate-Nelson as Managing Agent under an identical contract as that with Roosevelt Steamship Company. The Circuit Court held that Southgate-Nelson, under the contract, was an independent agent and, as such, was personally liable for its own negligence.

In its prevailing opinion in this Brady case the Circuit Court held that the Quinn case was distinguishable from the Brady case because Quinn was killed on a shore structure and, therefore, the tort was non-maritime, and the relevancy or applicability of the Suits in Admiralty Act was not before the court, because, since the tort happened on land structure, no suit in admiralty could be brought.

The majority held that Brady, having been injured by a maritime tort, his administratrix was relegated to a suit under the Suits in Admiralty Act, and that this provided the exclusive remedy against the United States or the Maritime Commission.

As to the contention of plaintiff below that where a private corporation is the contracting operator of a government-owned vessel, such private corporation is suable just the same as if there had been no Suits in Admiralty Act, the Circuit Court, while granting that neither the United States nor the Maritime Commission would be compelled to reimburse the agent for the damages it may pay for its own negligence, either under the contract or by

*Certiorari denied, 62 S. Ct. 185.

general principles of law, nevertheless decided that the fact no reimbursement would be made is not decisive under the Johnson case, 280 U. S. 320, for the Suits in Admiralty Act goes beyond the mere protection of any pecuniary interest of the government. The Act was designed to prevent seizure of vessels owned by the government, or its wholly owned corporations. No distinction was made between seizures from a private operating corporation and from an operating corporation owned by the government.

(Petitioner does not appreciate this reasoning for the common law action seized nothing, and the judgment would be collected from the P. & I. insurance policy.)

The decision proceeds: The Suits in Admiralty Act provides that a vessel shall not be subject to arrest or seizure if, *inter alia*, it is operated "by or for the United States or such corporation" and, furthermore, under the Johnson decision, *supra*, it was held that "the remedies given by the Act are exclusive in all cases where a libel might be filed under it".

(Again Petitioner does not understand the reasoning because in the Brady case no vessel was seized and no libel could now be filed because the widow of Brady, a civil employee of the government, having accepted federal compensation, cannot now sue the United States in admiralty or at law.)

The Circuit Court quoted from the Johnson case opinion to the effect that there would be no uniformity of remedies if, putting the United States and the Fleet Corporation on the same footing, and providing an exclusive remedy in admiralty against them, if, also, suits under the Tucker Act and in the Court of Claims be allowed against the United States, and actions at law, in state and federal courts, "be allowed against the Fleet Corporation, or other agents, for the enforcement of maritime causes of action covered by the Act". The court then said that the words "or other agents" used above meant not just a government-owned corporation like the Fleet Corporation but included a Managing Agent like Roosevelt Steamship Com-

pany since the agent in the Johnson case, the Navigation Company, was just such an agent as in the Brady case. Therefore, the Johnson case controls the Brady case. Accordingly the judgment was reversed with directions to dismiss the complaint.

Circuit Judge Clark, in a dissenting opinion, adhered to the language of the Suits in Admiralty Act, particularly Section 2, which is limited to the "United States or such corporation," the reference being to a government-owned corporation. He did not agree that the words "other agents" stretched the Act to include other agents than governmental agents under the old operating agreements.

He did not see any distinction between the Quinn case, in which the bridge-tender was killed on the bridge, a non-maritime tort, and the Brady ship's ladder case, a maritime tort. He considered government liability as the test —if the government is liable to respond in damages then the remedy is against the government; if a private operator is liable for the damages, then the suit should be against the private operator.

Brady v. Roosevelt Steamship Co., 128 Fed. (2d) 169.

Reasons Relied on for Allowance of the Writ.

1. The Circuit Court of Appeals entirely overlooked the fact that the Petitioner (plaintiff below) could not bring any suit, in admiralty or at law, against the United States because the decedent was a civil employee of the government and his widow had accepted federal employee's compensation, although the Employees' Compensation Act sanctions a suit against a "person other than the United States".

2. The Circuit Court of Appeals entirely overlooked the fact that Roosevelt Steamship Company was an independent contractor, and personally liable for its negligence,

a similar situation to that in which that court had recently held that the agent was liable for its own tort.

Quinn v. Southgate-Nelson Corporation, 121 Fed. (2d) 190; certiorari denied, 62 S. Ct. 185.

3. The Circuit Court of Appeals sought to avoid the effect of its decision in the Quinn case, *supra*, by saying that the negligence in the Quinn case was not maritime, whereas the negligence which killed Brady was maritime. That is a distinction without a difference. If an independent contractor or agent is personally liable for its negligence, its liability exists regardless whether the negligence was on a bridge or a ship's ladder. The circumstance that Quinn suffered a land tort and Brady suffered a maritime tort is too artificial and unsubstantial to form the basis for a determination that Quinn may sue at law but Brady cannot. It is the negligence, the tort, the act of omission or of commission by the agent which creates the right of action. The circumstance that in one case the accident was ashore and in the other aboard a vessel, is immaterial in a case like this. Liability is the test. If the agent is personally liable he may be sued in any proper forum. Whether the injury was sustained on a ship's ladder or upon a shore structure is purely incidental, except in situations where, if maritime, and the United States is involved, suit must be in admiralty.

4. The Circuit Court of Appeals entirely overlooked the several decisions of this Court to the effect that an agent of the United States, guilty of a wrongful act which causes injury to another, is personally liable for the damages.

Sloan Shipyard v. Fleet Corporation, 258 U. S. 549;

Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381;

U. S. Shipping Board v. Harwood, 281 U. S. 519;

Reconstruction Finance v. Menihan, 312 U. S. 81.

5. The Circuit Court of Appeals overlooked the fact that the Merchant Marine Act of 1936 entirely changed the relationship which formerly existed between government-owned corporations, like the Fleet Corporation, and its operators, to one where, by statutory mandate, the operator was required to be a "private operator" who must man, equip and supply the vessel; keep its appliances in repair; do no wrong which may cause damage; give a protection and indemnity policy to the Owner and also a bond of $80,000.00 to indemnify the Owner against loss or damage. That, therefore, the old decisions like the Johnson case, 280 U. S. 320; the Rosenberg case, 276 U. S. 202 and the Shea case, 253 N. Y. 17 are obsolete and are no longer precedents.

Respectfully submitted,

SIMONE N. GAZAN,
Attorney for Petitioner.

AUGUST P. KLEIN,
BENJAMIN H. SIFF,
of Counsel.

Dated: New York, N. Y.,
July 27th, 1942.

Certificate.

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

SIMONE N. GAZAN.

Exhibit "A".

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
285 Madison Avenue, New York, N. Y.

Commissioners

Jewell W. Swofford
Chairman
John J. Keegan
Albert H. Ladner, Jr.

Wm. McCauley
Secretary

In reply refer to File No. 593831

Mr. Simone N. Gazan
Attorney at law
One Broadway
New York, New York

July 9, 1942

Re: Brady v. Roosevelt
Steamship Company

Dear Sir:

The United States Employees' Compensation Commission understands that Margaret M. Brady, plaintiff-appellee in the United States Circuit Court of Appeals for the Second Circuit, is seeking through your office to secure a review by the Supreme Court of the United States of an adverse judgment by the Circuit Court of Appeals for the Second Circuit, in her suit against the Roosevelt Steamship Company, Incorporated.

While this Commission is not a party to that suit, it is, nevertheless, interested in having the decision reviewed by the Supreme Court of the United States, as the same may affect action of this Commission in numerous other cases arising under the Federal Employees' Compensation Act.

We, therefore, trust that you may in some proper way make this fact known to the court in your Petition for Review of the decision of the Circuit Court of Appeals.

Very truly yours,

UNITED STATES EMPLOYEES'
COMPENSATION COMMISSION
By JEWELL W. SWOFFORD
Chairman

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

MARGARET M. BRADY, as Administratrix of the Estate of James P. Brady, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Motions to Dismiss Properly Denied.

The defendant below moved, before trial, for a dismissal of the complaint for lack of jurisdiction over the subject-matter because,

a. Under the operating agreement between the Maritime Commission and Roosevelt Steamship Company, a Delaware corporation, as Managing Agent, the said agent did not possess or operate the vessel on its own behalf but on behalf of the United States of America, and, therefore the exclusive remedy was against the United States under the Suits in Admiralty Act (R. 50).

b. If any judgment should be recovered against Roosevelt Steamship Company the money required to

pay it would come from the United States Treasury, which would make the United States the real party in interest, and, under the decision in the Johnson case, 280 U. S. 320, suit should be against the United States under the Suits in Admiralty Act (R. 53).

This motion was denied (R. 209).

At the trial of the case the defendant renewed its said motion to dismiss for lack of jurisdiction but, in view of the decision in the Quinn case, urged only that the United States would have to pay any judgment against Roosevelt Steamship Company, and, therefore, the suit should have been in admiralty under the Suits in Admiralty Act (R. 348-350).

The attorney who made these motions was fully aware that the employment by the deceased as a United States Customs Inspector made him (and his administratrix) amenable to the Federal Employees' Compensation Act, and inasmuch as the widow had accepted compensation (R. 366) no suit could be brought against the United States, although the Act permits an action against the responsible third party.

Yet, he urgently and seriously argued, and the Circuit Court held, that the remedy was exclusively under the Suits in Admiralty Act, notwithstanding no such suit could possibly be maintained now.

However, we believe that the decision of the Circuit Court is unsound because neither premise upon which it rests finds factual support or legal precedent to sustain it.

Managing Agent Was Independently Liable.

Under the explicit language of the Act defining the ways and means of operation of the vessels until sale or charter is effected, the actual operation was to be entrusted to a "private operator". This was done. The United States owns no stock in the Roosevelt Steamship Company, a

Delaware corporation. We will not repeat here the provisions of the operating agreement (R. 84-129), liberally quoted in the Petition for Certiorari, which, not only establishes the independent character of the agent, but which imposes on the agent the obligation to fully manage, control and operate the vessel; provide the crew; make repairs; keep the ship's tools and appliances in a safe condition; to exercise due care to prevent loss or injury, and to procure liability insurance to indemnify it against damage suits.

These facts make such agent directly and personally liable for its own negligence (Quinn case, 121 Fed. [2d] 190), and suable at common law.

Panama Railroad v. Vasquez, 271 U. S. 557.

United States Will Not Have to Pay Judgment.

When the steamship "Waukegan" crashed into the bridge in Delaware, it not only killed Quinn but also another bridge-tender, Oakes. The attorney for the widow Oakes attempted to sue in admiralty, and filed a libel *in personam* against the United States and also against The Continental Insurance Company which had issued the P. & I. policy on that steamship.

The United States Attorney appeared in the Oakes case for the Government; Tompkins, Boal & Tompkins appeared for The Continental Insurance Company.

Oakes v. United States, et al., 35 Fed. Supp. 868.

In the Quinn case, against Southgate-Nelson Corporation, which did not name the United States as a party, Tompkins, Boal & Tompkins again appeared for the defendant, Southgate-Nelson.

Quinn v. Southgate-Nelson, 121 Fed. (2d) 190.

It is significant that the United States Attorney appeared for the United States in the Oakes suit (35 Fed. Supp. 868) but, although Mr. Collins, by affidavit (R. 59) and testimony (R. 328) insisted that the United States was vitally interested in this Brady case because the United States would have to pay any judgment against Roosevelt Steamship Company, it is passing strange that he, William E. Collins, District Counsel of the United States Maritime Commission and Special Assistant to the United States Attorney for the Southern District of New York (R. 56), did not appear herein as attorney to protect the interests of the United States in the litigation, but left the defense to the personal attorneys for the Roosevelt Steamship Company. Instead, he permitted himself to be used as a mere witness in an effort to protect Roosevelt Steamship Company, and its liability insurer, against a recovery of damages.

If it be true that the United States would be eventually liable to pay the judgment, the United States would have regularly appeared in the case, suggested its interest and invoked a ruling to protect itself.

The fact is, Mr. Collins to the contrary notwithstanding, that the liability insurer will pay the judgment.

The requirement in the contract for Protection and Indemnity Insurance (R. 111) was not an idle provision. It contemplated negligence by the agent which might eventuate in a judgment for damages and, should the agent be insolvent, the judgment would be collected from the insurance company.

New York Insurance Law, Sec. 167.

There is no legal obligation on the United States to reimburse the agent for damages paid as the result of its own negligence. If the United States should pay, it would be a mere gratuity.

Brady v. Roosevelt S. S. Co., 128 Fed. (2d) 169.

In the court below the appellant (defendant) cited the case of Admiral Oriental Line v. United States, 86 Fed. (2d) 201 (Second Circuit) (R. 179) which held that a General Freight Agent, forced to defend an action against it which grew out of regular acts performed within the scope of its principal's business, could recover the litigation expenses from the principal. That case simply gave recognition to the well-known principle that a sub-agent may recover expenses incurred in defending an unwarranted suit against it.

On the contrary, the same court had held that, as to an independent contractor, there could be no such recovery against the principal since the risks of the independent contractor's business are its own.

> Cory Bros. v. United States, 51 Fed. (2d) 1010 (10) (Second Circuit).

The Roosevelt Steamship Company, the independent contractor or agent, was in the performance of its own business of operating the vessel and of keeping its appliances in a safe and seaworthy condition. With that obligation went direct liability for its own negligence.

Therefore, since the Roosevelt Steamship Company was a free and independent agent, under the contract, and since the United States will not have to pay the judgment, and since the agent is legally liable for its own negligence in the performance or execution of its obligation under the contract, the Petitioner (plaintiff) was entitled to maintain the action at law against the Agent.

The decision of the Circuit Court of Appeals in this Brady case is clearly erroneous and, unless reversed, will deprive Petitioner of a substantial property right without due process. The right given in the decision to sue the United States in admiralty is an absolute nullity because it cannot now be done in this case because federal compensation has been accepted.

The Circuit Court misunderstood or misinterpreted the *Lustgarten* case (280 U. S. 320), that being the case referred to in its opinion as having happened on the steamship "Coelleda", which was "operated for it (the United States) by the Navigation Company as agent pursuant to an agreement made by the United States acting through the Shipping Board represented by the Fleet Corporation". The Circuit Court opinion said "Apparently the Navigation Company was, in all material respects, in the position of the Roosevelt S. S. Co., Inc. as the agent in this instance." There is not the slightest similarity. The Navigation Company agreement was one of the old forms and was strictly an agency for the Fleet Corporation agreeement. The contract with the Roosevelt Company was under a statute which required a "private operator".

In the Lustgarten case, the cause of action for indemnity had been dismissed by the trial court and the action proceeded for maintenance and cure, which was properly against the vessel's owner, under the maritime law. As to maintenance and cure the United States, as owner, was the right defendant (The Osceola, 189 U. S. 158). The issue of negligence was not in that case. The United States, as owner, had to pay. It was the only person to sue since maintenance and cure is a right flowing from the maritime contract between ship and seaman.

Pacific S. S. Co. v. *Peterson*, 278 U. S., at page 138.

Therefore, the Lustgarten case is not a precedent for the Brady decision because (a) in the Lustgarten case the operating company was not an independent agent like the Roosevelt Company; (b) in the Lustgarten case the maritime law made the owner of the vessel, the United States, liable for maintenance and cure, while in this case no contract, statute or law makes the owner liable for the torts of the Roosevelt Steamship Company; (c) Brady was not a seaman, and did not assert a claim against the vessel's owner; (d) the inclusion of "other agents" in

the Johnson (Lustgarten) opinion transcends the language of the Suits in Admiralty Act, and expands its coverage beyond its own restriction to "any vessel owned by, in the possession of or operated by or for the United States or any corporation in which the United States or its representatives own the entire outstanding capital stock."

The use of the words "other agents" was purely a slip of the pen, but when seized upon by the majority opinion in the Brady case, well, as the dissenting opinion naively put it, "We have our present problem."

The Brady decision is erroneous.

The Merchant Marine Act of 1936 Established a New Relationship With Operating Agents.

The Suits in Admiralty Act was passed in 1920 when government merchant vessels were operated by mere sub-agents, and the district courts were holding Fleet Corporation agreements to be agency contracts and its employees to be servants of the United States. These vessels were being seized and delayed by libels *in rem*, release obtainable only by giving bond, and the Congress remedied that situation by substituting the credit of the United States in lieu of its vessels.

But this Court, in the Sloan Shipyards case, 258 U. S. 549, decided that the Fleet Corporation, even if an agent, was personally liable for its own torts, and could be sued therefor.

Then in 1936 an entirely new plan for the operation of government-owned merchant vessels was devised. The Congress departed radically from the old Shipping Board and Fleet Corporation set-up, with their sub-agency operating agreements. It sidestepped the Suits in Admiralty Act of 1920, which had served its purpose as to government vessels "operated by or for" the United States or

the Fleet Corporation. Congress wanted no more admiralty suits; it had terminated the Shipping Board and it wanted less tort litigation. It established the Maritime Commission and directed that government merchant vessels be operaed by *private operators* on certain definite and established routes, and under prescribed trade names.

Title 46, U. S. C. A., § 1101.

Such operation was to continue until the Government could obtain a satisfactory purchaser or charterer. These contracts with the private operators expired by their own terms on June 29, 1937.

In anticipation that there might be a failure to sell or to charter, the Congress provided for a continuance of the private corporation as operators and made it mandatory on the Maritime Commission that said vessels "shall be *temporarily operated* by the Commission for its account *by private operators*" until such time and upon such operating agreements as the Commission shall deem advantageous.

Title 46, U. S. C. A., § 1194.

Consequently, the Suits in Admiralty Act, which was intended to prevent interference with ship sailings by libels *in rem*, under the old law and practice, cannot be invoked now when the Congress has entirely changed the relationship between the government-owner and the actual operator, by making a private corporation (no stock of which is owned by the United States) an independent contractor —designated in the contract as "Managing Agent"—to take phycical possession of its vessels and to "manage, operate and conduct the business of the Line" (R. 90); to "man, equip, victual, supply and operate the vessels" (R. 99); bound it to a "strict compliance with the minimum

manning scales and minimum wage scales" (R. 102), and obligated it to procure protection and indemnity insurance (R. 111).

Therefore, if such independent contractor, or its servants, should furnish defective appliances or unseaworthy equipment, or commit any negligence from which injury results, the injured party may hold the independent contractor, operating agent, personally liable for such negligence, even though contractually such agent was operating a government merchant vessel "for the United States".

In other words, the Merchant Marine Act of 1936, in directing the Maritime Commission to procure the operation of its vessels by "private operators", thereby superseded the Suits in Admiralty Act which contemplated a situation where *government-owned corporations* and not private independent contractors, operated the vessels.

Prior to this Court's decision in the Sloan Shipyards case (258 U. S. 549), the Suits in Admiralty Act furnished the exclusive remedy against the United States on all causes of action arising out of operation of its merchant vessels.

Shipping Board v. Rosenberg Bros., 276 U. S. 202;
Johnson v. Fleet Corporation, 280 U. S. 320.

By the Suits in Admiralty Act the United States waived its sovereign immunity and its provisions had to be strictly followed.

But the reason for that Act has now ceased to exist for neither the United States nor any corporation owned by it, operate its vessels. Third parties, private corporations, independent agents, operate them, and such agents are personally and directly liable for their own negligence.

The Administratrix has no Right of Action Against the United States.

Civil employees of the government if they accept compensation, cannot sue the government in personal injury or death cases. Once compensation is accepted by the widow the sole and exclusive remedy against the United States continues under the United States Employees' Compensation Act. This Act, however, does authorize a suit against a "person other than the United States".

Wood v. Ford Garage Co., 293 N. Y. Supp. 999.

Mrs. Brady, widow, has two children, Virginia, aged 15, and James, aged 20, at the date of their father's death. James, being over 18, was not entitled to any compensation and Virginia would be entitled only until she attained 18 years—a rather small sum.

These two children would be entitled to practically two-thirds of the $22,760.00 judgment and the widow to one-third, less her re-imbursement for the compensation theretofore received.

Let it not be thought, therefore, that this suit is prosecuted to repay the Compensation Commission for its payments. That consideration does not enter the case except as defendant's counsel sought to inject that matter into the case (R. 342-347) to prejudice the plaintiff before the jury.

Notwithstanding the widow took compensation, she has a claim for damages against the wrongdoer and her children have quite a substantial amount at stake, to wit, about $7,550.00 each. They have a legal right to collect these damages notwithstanding their mother has accepted compensation.

Doleman v. *Levine*, 295 U. S. 221.

The deceased, Brady, was a civil employee of the government and, therefore, the decision of the Circuit Court of Appeals holding that the Suits in Admiralty Act affords his administratrix the only remedy, is an empty and valueless determination, for there can be no indemnity suit against the United States on behalf of a civil employee, either at law or in admiralty, where there has been an election to take, and acceptance of, federal compensation.

Dahn v. Davis, 258 U. S. 421.

If the Brady decision stands then the private operator of a merchant vessel of the United States, under the contract before the Court, can, with impunity, negligently injure or kill immigration inspectors, public health doctors and customs agents who necessarily board such vessels. The ship's officers could negligently collide at sea with another government merchant vessel, damage it, or injure or kill the seamen; a vessel could ram piers and damage them; demolish bridges or sink lightships, and be immune to any kind of action.

Did the Suits in Admiralty Act contemplate any such immunity to a private operator, whether the tort be committed on land or upon navigable water?

The Suits in Admiralty Act is only available where, if the vessel had been privately owned, a libel in admiralty would lie. If the cause of action was non-maritime the Act could not be invoked, but that does not exclude a common law action if there is a party against whom a legal liability exists for the tort, even though the government owned the vessel. Mere government ownership of and by itself, isolated and alone, cannot defeat this plaintiff. If such government-owned vessel be turned over to a third party to operate as an independent agent, such agent may be sued at law, under the state death statute, for the consequences of its own, direct negligence.

Even Agents of Fleet Corporation Liable for Own Negligence.

The Fleet Corporation had an operating agreement with the Admiral-Oriental Line to operate government-owned vessels between China and our West Coast. The agent in China accepted certain freight for New York and issued a bill of lading for initial carriage on the steamship "President Madison", and it specified that the freight was to be transshipped at Seattle to a vessel of the American Line or the Luckenbach Line. However, the Agent breached its bill of lading by placing the freight on a vessel of a different line. This vessel was lost. The owner of the freight sued the United States which sought to implead the agent as a party. The same court which decided that Brady could not sue the agent for its negligence, held that the Admiral-Oriental Line could be impleaded because, notwithstanding its agency for the United States, it was personally liable for its negligence in violating the provisions of the bill of lading.

Blumenthal v. United States, 30 Fed. (2d) 247 (2) (Second Circuit).

In another case where the government-owned vessel was turned over to the New York & Cuba Mail Steamship Company under an operating agency agreement, the agent had its Chief Stevedore on Pier 16, Brooklyn. There were certain barges moored at the end of the pier, one of which, No. 20, was owned by a third party.

The steamship "Suwied", operated by the agent under the usual agreement, was attempting to dock at this Pier 16. The captain of the "Suwied" appreciated the danger to the barges should he attempt to dock, and he requested the Chief Stevedore to move them. This request was refused and the Chief Stevedore ordered the "Suwied" to dock. In so doing the barge No. 20 was damaged and its

owner sued the New York and Cuba Mail for the damages. This agent sought to cast the liability upon its principal, the United States, but the same Court which held that Brady, administratrix, could not sue Roosevelt Steamship Company for its negligence, held that the New York & Cuba Mail, the agent, was personally responsible for the negligent order of its employee, the Chief Stevedore. That was a maritime tort!

N. Y. & Cuba Mail v. United States, 12 Fed. (2d) 348 (Second Circuit).

CONCLUSION.

The Roosevelt Steamship Company, a private corporation, acted as Managing Agent of the Maritime Commission (United States) under a contract which imposed certain definite obligations not only to manage and operate vessels, but to exercise care to make repairs and to keep the appliances in a safe condition; and to man, equip and supply the vessels.

The Roosevelt Steamship Company became, in legal contemplation, the owner *pro hac vice* during the life of the contract.

Reed v. United States, 11 Wallace 601;
Leary v. United States, 14 Wallace 610;
The Barnstable, 181 U. S. 464;
The Del Norte, 119 Fed. 118.

Even though the licensed officers had to be approved by the Maritime Commission, nevertheless the agent was the owner *pro hac vice*.

The India, 14 Fed. 476;
The Bombay, 38 Fed. 512;
Hill v. Leeds, 149 Fed., at page 880.

No matter who hired the ship's licensed officers, they were the servants of the Managing Agent.

Hahlo v. Benedict, 216 Fed. 303 (2);
The Charlotte, 285 Fed. 84.

It was the negligence of these officers, servants of Roosevelt Steamship Company, which caused the death of Brady.

The Roosevelt Steamship Company is a private corporation and as such may be sued in state or federal courts.

United States ex rel. v. McCarl, 275 U. S. 1.

The decision of the Circuit Court of Appeals which denied this right and deprived Petitioner of a just and fair verdict, is contrary to law; it misinterprets the Suits in Admiralty Act; it misconstrues the Merchant Marine Act of 1936; it nullifies certain provisions of Employees' Compensation Act, and remits Petitioner to a non-existent remedy in admiralty, all amounting to a denial of due process.

The Writ should be granted.

Respectfully submitted,

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Attorney for Petitioner.

AUGUST P. KLEIN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 269.

MARGARET M. BRADY, as Administratrix of James P. Brady, deceased,

Petitioner,

vs.

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

BRIEF FOR PETITIONER.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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BRIEF FOR PETITIONER.

The Opinions of the Court Below.

This case was heard and decided by the Circuit Court of Appeals for the Second Circuit, the bench having been composed of Judges Augustus N. Hand, Harrie B. Chase and Charles E. Clark. It was a two to one decision, Judge Clark having dissented.

The majority opinion held that, because the vessel was owned by the United States and the cause of action was

for a maritime tort, the exclusive remedy of the plaintiff was under the Suits in Admiralty Act. This, notwithstanding that at the time of the accident the vessel was being operated by a private, independent operator, who was sued, and that any judgment recovered would not have to be paid by the United States.

The majority opinion took the position that if a libel *in rem* could have been brought against the vessel, had it been privately owned, then *ipso facto* the exclusive remedy of plaintiff was under the Suits in Admiralty Act, irrespective of any direct and personal liability of the operating agent for its own independent negligence.

The majority opinion ignored the law that an agent is liable for its own torts, as decided by this Court in *Sloan Shipyards* v. *U. S. Fleet Corporation*, and other cases, and its own recognition of that law in Quinn v. Southgate Nelson, 121 Fed. (2d) 190. It based its decision on the *dictum* of this Court in *Johnson* v. *Fleet Corporation*, 280 U. S. 320, wherein the Court said:

> "Putting the United States and the Fleet Corporation on the same footing, and providing remedies to be exclusive in admiralty, would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States, and actions at law, in state and federal courts, be permitted against the Fleet Corporation *or other agents* for enforcement of the maritime causes of action covered by the Act." (Italics supplied.)

The majority seized upon the words "or other agents" as if thereby this Court had judicially legislated an amendment to the Suits in Admiralty Act which confined its application to "vessels owned by the United States, or a corporation with government-owned capital stock, or operated by or for the United States or such corporation".

"Such corporation" referring necessarily to the government-owned capital stock corporation, and not to privately owned corporations, as independent contractors, such as the defendant, Roosevelt Steamship Company.

The Consolidated Navigation Company, party sued in the Lustgarten case, was not a private operator but a mere sub-agent of the Fleet Corporation, under the old form of agency agreement, and any recovery against it would have been paid by the United States.

The effect of the majority opinion was to make it impossible to sue an independent, private corporation at common law for its own negligence if, perchance, such private corporation happened to be operating a government owned vessel at the time, and the injury or death occurred on navigable water.

The minority dissent could find no justification for expanding the plain language of the Suits in Admiralty Act simply because this Court had let slip the words "or other agents". Did this Court thereby intend to take away rights of litigants to ever sue independent agents for their own torts? Hardly, in view of its unbroken line of decisions holding that an agent is liable for its own torts, and may be independently sued.

> Sloan Shipyard v. Fleet Corporation, 258 U. S. 549;
> Fleet Corporation v. Harwood, 281 U. S. 519;
> Kiefer & Kiefer v. R. F. C., 306 U. S. 381.

Nor could the dissenting Judge differentiate between the agent's common law liability for its own torts simply because the negligence happened on the ship rather than on the shore. The wrongdoing constituted the cause of action. Where it took place was incidental.

The opinions are reported in Brady v. Roosevelt Steamship Company, 128 Fed. (2d) 169.

History of the Suits in Admiralty Act.

The Suits in Admiralty Act was enacted to stop the physical seizure of government merchant ships under libels *in rem* or by attachment, thereby causing delay in sailings and inconvenience in furnishing bonds to release the vessels.

At that time, 1920, the vessels were government-owned and were operated by the Fleet Corporation, also government owned. The Government was as solvent as any liability insurance company and, in order to stop the annoyance of libels *in rem* or other seizure under civil process, the Congress substituted the credit of the United States to indemnify claimants, and enacted the legislation (Suits in Admiralty Act) which required all parties having claims against the United States or its Fleet Corporation, in instances where, if privately owned, the vessel would be subject to seizure by libel *in rem*, to proceed by libel *in personam* against the United States in admiralty. There was no intention to deprive claimants against private operators of their common law action.

At that time the government was in the steamship business. Its vessels were being operated by the Fleet Corporation which made sub-agency contracts—the old M. O. 3 and M. O. 4 agreements—with steamship companies for the actual operation of the vessels.

At that time the government was a self-insurer. It had set up the United States P. & I. Agency which handled all personal injury, death and cargo damage claims. It had its own legal staff to defend suits.

Came a time when the government decided to get out of the shipping business and the Shipping Board, the Fleet Corporation and the United States P. & I. Agency were dissolved and ceased to exist.

But the government still owned merchant vessels and the government wanted to build up its merchant marine and to continue the established shipping routes, and to

perpetuate the well-known trade names of its lines. This was to be accomplished by some means *other than for the government to become engaged in the actual operation.* It had some ships; it needed more ships; it wanted vessels which would, in time of war, be available as naval auxilliaries, but it did not want any more Shipping Board or Fleet Corporation headaches!

Congress was equal to the occasion and, after making a clean sweep of the Shipping Board and its *impedimenta,* enacted the Merchant Marine Act of 1936 which created The Maritime Commission. That Act provided a new departure for merchant ship operation—it was to be done by *private operators.*

Title 46, U. S. C. A., Sec. 1194.

The plan was to preserve the existing trade routes then operated by private companies; establish others not already satisfactorily served by an American company, and to sell or lease the vessels under bare boat charter.

> "It shall be the policy of the Commission to encourage private operation of each essential steamship line now owned by the United States by selling such lines to citizens of the United States in the manner provided in Sec. 866 of this title, and in strict compliance with section 864, of this title, *or by demising its vessels on bare boat charter* to citizens of the United States who shall agree to maintain such line or lines in the manner hereinafter provided."
>
> 46 U. S. C. A., Sec. 1195.

To emphasize the fact that the government did not want any departure from accepted admiralty practice in respect of the character of charter to be entered into, it took the precaution to declare:

"The charters to be made by the Commission . . . shall demise the vessels subject to all usual conditions contained in bare boat charters. . . ."

46 U. S. C. A., Sec. 1201.

In anticipation that neither sale nor satisfactory charter would be obtained within the time limitation, it was provided, in such contingency, for the temporary operation of the lines by private operators, as follows:

"All vessels transferred to the Commission by this chapter and now being operated by private operators on lines in foreign commerce of the United States, shall be temporarily operated by the Commission for its account *by private operators* until such time and upon such operating agreements as the Commission may deem advantageous. . . ."

46 U. S. C. A., Sec. 1194.

In other words, where a line was being operated by private operators, and neither sale nor charter had been had prior to the dead line (June 29, 1936), then the Commission could arrange for such *private operator* to continue the operation as before but temporarily only, so as not to interfere with a possible sale or charter.

The whole plan of the legislation was to permit the United States to retire as an operator of merchant ships but to have the Maritime Commission, as an agency, to promote and foster the continuance of established lines and to arrange for the operation of new lines. Actual operation, that is, the physical manning, equipment, maintenance and running of the vessels, was to be in the hands of private operators, the Commission reserving only such supervision over personnel as to provide experienced licensed officers.

Statement of the Case.

The United States, through the Maritime Commission, owned the merchant vessel "Unicoi". This vessel was one of the fleet which had been operated under the trade name of American Pioneer Line.

This operation had been carried on by Roosevelt Steamship Company, as Managing Agent, but the contract would expire by operation of law, to wit, under the Merchant Marine Act of 1936, on the 29th day of June, 1937 (R. 22).

This Merchant Marine Act terminated the old Shipping Board, and the Fleet Corporation and put the United States out of the shipping business. From their ashes rose the Maritime Commission which took title to all vessels then owned by the Shipping Board; was empowered to construct new ones and to sell or charter all vessels to private operators with the design and purpose of establishing a strong merchant marine to continue the operation of established routes, and to organize new routes, in a bid for world trade.

Not having secured a sale, or satisfactory charter, of the vessels navigating the American Pioneer Line before the expiration of the contract with Roosevelt Steamship Company, the Maritime Commission exercised the power given by the Act to have the line temporarily operated for it by a *private operator*, as was mandatory under the law.

46 U. S. C. A., Sec. 1194.

Accordingly, a new agreement was entered into on June 28, 1937, whereby the Roosevelt Steamship Company, a private corporation under the laws of Delaware, succeeded itself as operator of the line and became Managing Agent (R. 21). The contract recites (R. 22):

> "Whereas, the Managing Agent has indicated its willingness to undertake the *management and operation* of the Line. . . ." (Italics supplied.)

The above quoted part of the preamble definitely fixes the independent character of the operator, and it is emphasized by the following provisions (all italics supplied):

A. "The owner hereby designates the Managing Agent as its Managing Agent to *manage, operate and conduct the business of the Line* . . . on behalf of the Owner . . . and under its supervision and direction" (R. 22).

B. "The Managing Agent shall *manage and operate* the said vessels under the trade name American Pioneer Line . . ." (R. 24 (6).

C. "The Managing Agent agrees to *man, equip, victual, supply* and *operate* the vessels, subject to such restrictions and in such manner as the owner may prescribe . . ." (R. 25 (7).

D. "The Managing Agent agrees to *conduct its operations* with respect to the vessels . . . in full compliance with applicable provisions of law, and particularly the Act, . . . and with due regard to *wage and manning scales* . . ." (R. 25 (8).

E. "The Managing Agent shall . . . exercise reasonable care and diligence to maintain the vessels in a *thoroughly efficient state of repair*, covering . . . *tackle* . . . *equipment* . . . and will effect *maintenance and voyage repairs and replacements* . . ." (R. 26 (11).

F. "The Owner shall provide . . . hull, machinery and port risk insurance, and the *Managing Agent shall provide*, for the account of the Owner and subject to its approval, *Protection and Indemnity*, and such other forms of insurance as the Owner may deem necessary" (R. 28 (14).

G. The Managing Agent is obligated to provide a bond "to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the Managing Agent contained in this agreement" in the amount of $80,000.00 (R. 29 (18).

H. "Any agents selected or appointed by the Managing Agent shall be solely the agents of said Managing Agent and not, in any respect, the agents of the Owner . . ." (R. 30 (23).

I. "The Owner may terminate the agreement if (a) A voluntary sale by the Managing Agent of this agreement, or any interest therein, or an assignment . . . *whereby the management or operation of the above described Line or vessels shall be divested from the Managing Agent* . . ." (R. 31 (25).

This agreement was substantially a bare boat charter of the vessels to Roosevelt Steamship Line, the Owner retaining only such supervision as would tend to safeguard and protect its properties.

The steamship "Unicoi" docked in New York on the morning of July 9, 1938 and immediately put over a long ladder from ship side to dock. It was the duty of Brady, the Customs Inspector, to promptly go aboard that vessel in the performance of his duties. While ascending the ladder a defective and rotton rung gave way under his weight; he dropped to the next rung below, still holding on with his hands. He obtained a new footing and continued on up, boarded the vessel and attended to his duties.

From internal injuries sustained when his body dropped as the rung broke, he died on July 20, 1938.

Brady, the deceased, as a U. S. Customs Inspector, was a civil employee of the government. If such employees accept compensation they cannot sue the government in personal injury or death cases. Once compensation is

accepted by the widow the sole and exclusive remedy *against the United States* continues to be under the United States Employees' Compensation Act. This Act, however, does authorize a suit against a "person other than the United States".

Mrs. Brady, widow, has two children, Virginia, aged 15, and James, aged 20, at the date of their father's death. She has accepted compensation from the United States Employees' Compensation Commission.

Notwithstanding that the widow took compensation, she has a claim for damages against the wrongdoer and her two children have quite a substantial amount at stake, to wit, about $7,550.00 each. They have a legal right to collect these damages notwithstanding their mother had accepted compensation.

Doleman v. Levine, 295 U. S. 221.

The deceased, Brady, was a civil employee of the government and, therefore, the decision of the Circuit Court of Appeals holding that the Suits in Admiralty Act affords his administratrix the only remedy, is an empty and valueless determination, for there can be no indemnity suit against the United States on behalf of a civil employee, either at law or in admiralty, where there has been an election to take, and acceptance of, federal compensation.

Dahn v. Davis, 258 U. S. 421.

His widow, as administratrix, brought a common law action under the death statute of New York and, upon trial, recovered a judgment of $22,760.00.

The defendant never questioned, on appeal, the negligence which caused the accident, and the resulting death, nor was any attack made upon the amount of the verdict.

The defendant urged by motion before trial (R. 11) and also upon the trial (R. 90) the contention that the Court did not have jurisdiction of the subject-matter, be-

cause the accident was a maritime tort; the vessel was owned by the United States; the Roosevelt Steamship Company was a mere agent of the United States operating the boat, not on its own behalf but on behalf of the United States; that any judgment recovered would be paid out of the Treasury of the United States and, therefore, the sole remedy was against the United States under the Suits in Admiralty Act.

At the trial the defendant assumed, for the argument, that the Roosevelt Steamship Company did independently operate and control the vessel and employed the members of the crew (R. 90) but contended that the judgment would have to be paid by the United States and, therefore, under the doctrine of Johnson v. Fleet Corporation, 280 U. S. 320, the sole remedy was under the Suits in Admiralty Act.

Both the formal motion before trial and the procedural motion at the trial were denied.

The defendant appealed this jurisdictional question and the Circuit Court of Appeals, by a two to one decision, reversed the judgment and directed that the complaint be dismissed, stating that the sole remedy was against the United States under the Suits in Admiralty Act.

This Court granted certiorari.

Specification of Errors.

One.

The Circuit Court erred not only in following the *Johnson v. Fleet Corporation* decision, 280 U. S. 320, but in interpreting it to hold that mere ownership of a vessel by the United States *ipso facto* makes the Suits in Admiralty Act the exclusive remedy. The Suits in Admiralty Act applies only to corporations whose capital stock is owned by the United States.

Two.

The Circuit Court erred in ignoring the fact that the defendant sued was a private, independent corporation no stock of which was owned by the government, and that under the operating agreement it was a responsible agent, personally liable for its torts, and, as such, subject to suit under numerous decisions of this Court.

Three.

The Circuit Court failed to note the absolute difference between the Fleet Corporation and its sub-agent, Consolidated Navigation Company, as present in the Johnson and Lustgarten cases, and the Roosevelt Steamship Company, in this Brady case, and, therefore, the Circuit Court misapplied the Johnson-Lustgarten decision.

Four.

The United States will not have to pay the judgment and hence, on this ground, the Suits in Admiralty Act has no application.

POINT ONE.

The Circuit Court erred in holding that mere Government ownership, of and by itself, was all that was necessary to make the Suits in Admiralty Act applicable, and disregarding the independant contractor character of the agent in charge of operations.

The Suits in Admiralty Act comes into effect only when, for a maritime tort, the vessel, if privately owned, would be subject to seizure under a libel *in rem*, or when the United States is so interested that it would have to pay the judgment.

In this case there was no attempt at seizure. A proceeding *in rem* in admiralty would never have been attempted for that would have necessitated intervention by the United States, and the libel would have been dismissed on motion.

The plaintiff had no claim against the owner or against the vessel. Her claim was solely against the Roosevelt Steamship Company, not only a solvent defendant but one fully covered by liability insurance against plaintiff's claim.

The Roosevelt Steamship Company was a private, domestic corporation of Delaware, and none of its stock was owned by the United States or any of its agencies. The plaintiff sought to establish a direct liability against this independent agent for its own torts, a right long recognized by this Court even as against the Fleet Corporation (Sloan Shipyard case, 258 U. S. 549), and by the Circuit Court of Appeals, Second Circuit, against a similar agent under an identical Maritime Commission agreement.

Quinn v. Southgate Nelson, 121 Fed. (2d) 190;
Cert. denied 314 U. S. 682.

The fact that the government owned the boat was purely a circumstance but one which should have had no influence where the cause of action was *solely against the agent for the agent's own negligence.*

If the decision complained of is sound then it effectually nullifies a long line of cases in this Court which have held that an agent is subject to suit for its own torts.

The Suits in Admiralty Act does not apply to this case merely because the government owned the vessel, and where the government will not have to pay the eventual recovery.

POINT TWO.

The defendant, Roosevelt Steamship Company, under the operating agreement pursuant to the Merchant Marine Act of 1936, was an independant agent, charged with the duty and responsibility of operating the vessels and of keeping them and their appliance seaworthy and in repair, and it was error to have set aside the verdict, and holding that the sole remedy was in admiralty.

The agreement obligated the Roosevelt Steamship Company to actually operate the vessels; to man, equip and supply the vessels; to observe manning and wage scales; to keep the vessel in repair; to exercise care and diligence to save the owner against loss or damages; to provide liability insurance and to give a bond for faithful performance.

True, in practice, the Owner supervised the selection of the officers and paid their salaries, but these officers and crew were under the orders of the steamship company's marine managers who directed them in the execution of their work. Under these circumstances they were the servants of the steamship company regardless of who actually paid their salaries.

Linstead v. C. & O. R. R., 276 U. S. 28;
Denton v. Yazoo R. R., 284 U. S. 299.

The steamship company became the owner *pro hac vice*. It was immaterial who hired the officers and crew, the relationship of master and servant existed between Roosevelt Steamship Company and the ship's personnel.

Hahlo v. Benedict, 216 Fed. 303 (2);
Hill v. Leeds, 148 Fed. 880;
The Charlotte, 285 Fed. 84;
The Bombay, 38 Fed. 512;
The Santa Cruz, 1938 A. M. C. 1505.

The Circuit Court erred in depriving this petitioner of her judgment which was authorized under the facts and the law.

POINT THREE.

The Circuit Court erred in following the Johnson-Lustgarten decision, which was under the old Fleet Corporation setup, and not authority for the new relationship under the Merchant Marine Act of 1936 and the operating contract thereunder which requires a private operator.

A brief historical review may be helpful in following the evolution of the relationship between the government and shipping companies.

The Act which created the United States Shipping Board was enacted in 1916 and placed all merchant vessels owned by the United States in the same category as privately owned vessels.

In 1919 this Court held that, under the said Act of 1916, a merchant vessel owned by the United States was subject to seizure like any other vessel.

The Lake Monroe, 250 U. S. 246.

To obviate the effect of that decision the Congress passed the Suits in Admiralty Act in 1920.

That Act was designed solely to prevent seizure of United States merchant vessels under libels *in rem* and to compel claimants to sue the owner in admiralty in respect of claims against either the government-owned vessel or the government-owned Fleet Corporation.

The Fleet Corporation, despite the fact that all of its stock was owned by the United States, was held by this Court (1922) to be independently liable for its own negligence and torts, sovereign immunity not extending to the Agent.

Sloan Shipyards v. Fleet Corporation, 258 U. S. 549.

That decision definitely and finally settled the question as to whether agents, when operating government vessels, were personally liable for their own negligent acts.

Thereafter the Courts held that direct suits may be brought against the Fleet Corporation at common law.

> Fleet Corp. v. Greenwald, 16 Fed. (2d) 948;
> Blumenthal v. United States, 30 Fed. (2d) 247
> and numerous others.

Such continued to be the law and it was generally applied by the Courts. Congress could not have been ignorant of it and certainly the government officials, who inspired the enactment of the Merchant Marine Act of 1936, knew all about it.

Yet, the Merchant Marine Act of 1936 not only expressly preserved to seamen their rights "under any provision of existing law" (46 U. S. C. A., Sec. 1128-f) but, notwithstanding Congress had under consideration the providing for insurance covering among other things, marine and war risk for "personal effects of masters, officers and crews thereof" (46 U. S. C. A., Sec. 1128-a) and took the precaution to enact that actions therefor shall be under the Suits in Admiralty Act (46 U. S. C. A., Sec. 1128-d) nevertheless did nothing to change the existing law that independent operating agents of government-owned merchant ships were personally liable for their own torts, and that common law suits could be brought against such agents without offending the Suits in Admiralty Act.

In the Lustgarten case, 280 U. S. 320, the vessel was operated by the Consolidated Navigation Company as a sub-agent of the Fleet Corporation. The government owned the vessel. The Fleet Corporation was wholly government-owned and it was performing a function of government, and its sub-agent was similarly performing a governmental function. The government would have to pay any judgment against it.

The fact that the Consolidated Navigation Company was a mere sub-agent of a government-owned corporation, performing service for and on behalf of the government, brought it under the terms of the Suits in Admiralty Act.

Had the Consolidated Navigation Company, a private corporation, contracted independently with the Shipping Board to man, equip and operate the government vessel, the decision doubtless would have been in accordance with this Court's decision in the Sloans Shipyard case.

There is a vast difference between operations under the old M.O. 3 and M.O. 4 forms of sub-agency contracts with a government-owned corporation, and a Managing Agreement under a statute which expressly requires that the line be managed and operated by a *private operator*.

We may safely disregard all the old forms and adjudications thereunder. They illustrate no feature of the Brady case. Even the Lustgarten case throws little light because it was predicated on the old sub-agency agreements. Even in the petition for certiorari in the Lustgarten case, the United States said (p. 7):

> "The operating agent likewise is to be held a public agent without responsibility unless for *personal negligence.*" (Italics supplied.)

The Johnson-Lustgarten cases, decided by this Court in 1930, were tort actions at law against the Fleet Corporation and the Consolidated Navigation Company, its sub-agent, which had been engaged in the execution of an agreement to operate vessels of the United States.

Under the particular facts of those cases it was seen that the Consolidated Navigation Company was performing a governmental function under an agency agreement with the Fleet Corporation; that under that arrangement the United States would have to pay the eventual judgment, which facts brought those cases squarely within the provisions and intendment of the Suits in Admiralty Act. We quote from the opinion:

"On the facts above stated it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, *the money required to pay the judgment against* any one of the defendants in these cases *would come out of the United States. It is the real party affected by all these actions.*" (Italics supplied.)

Johnson et al. v. Fleet Corporation, 280 U. S., at pages 326-327.

Therefore, for torts occurring on a merchant vessel of the United States, while operated for the United States by a governmental agent and sub-agent, under the old Shipping Board forms, and for which the United States was obligated to respond in damages, the exclusive remedy was by suit in admiralty against the United States.

But, where the facts are totally different, as where, instead of a public agent, or its sub-agent, operating the vessel, there was a private corporation, no stock of which was owned by the government; where such operator was engaged in a private enterprise, acting under the mandate of a statute which specified operation by a "private operator"; where the United States would not have to pay any judgment recovered against such private corporation for such agent's own negligence, then, under such circumstances, the Johnson-Lustgarten decision would have no application.

This Brady case embodies all those distinguishing facts which takes it without the Johnson-Lustgarten decision. Brady sued an independent contractor or agent upon its personal liability for its own negligence. The agent is not only personally solvent but has furnished a sufficient liability bond to guarantee payment of the judgment. The United States does not own any stock in the Roosevelt Steamship Company. The United States is not the real

party in interest, and has never suggested any interest in court so as to have had the litigation proceed under the Suits in Admiralty Act. Even if the Roosevelt Steamship Company was operating a government-owned vessel it did so as an independent agent and did not become clothed with the immunity enjoyed by the government. It was directly liable for its own wrongs, notwithstanding it was an agent.

Fleet Corporation v. Harwood, 281 U. S. 519;
Sloan Shipyards v. Fleet Corporation, 258 U. S. 549;
Reconstruction Finance v. Menihan, 312 U. S. 81;
Keifer & Keifer v. Reconstruction Finance, 306 U. S. 381;
Federal Land Bank v. Priddy, 295 U. S. 229.

The Circuit Court of Appeals was in error when it concluded that the relationship of Roosevelt Steamship Company to The Maritime Commission was practically the same as that between the Consolidated Navigation Company and the Fleet Corporation in the Johnson-Lustgarten cases.

The Fleet Corporation was entirely government-owned. The Roosevelt Steamship Company is a private, Delaware corporation, no stock of which is owned by the government.

The Consolidated Navigation Company was a mere sub-agent of the Fleet Corporation, under the old agency agreements, for the performance of governmental functions for its principal. The Roosevelt Steamship Company operates under the Merchant Marine Act of 1936 which expressly required the operations to be by a private operator.

The United States was obligated to pay the damages incurred for personal injury or death during operations by the Fleet Corporation and its sub-agents. The United States is not liable for the payment of any judgment against Roosevelt Steamship Company because (a) the

Roosevelt Steamship Company is an independent contractor and individually liable for its own negligence, and (b) a liability bond, required by the contract, fully indemnifies the judgment-creditor.

There is not the slightest similarity between the situation which was before this Court in the Johnson-Lustgarten cases and that now presented by this Brady record.

And since there was a right of action *ex delictu* against the agent it was enforceable at common law, and the decision that relief can only be had in admiralty was erroneous.

Panama Railroad v. Vasquez, 271 U. S. 557;
United States v. McCarl, 275 U. S. 1.

POINT FOUR.

The United States will not have to pay the judgment and, hence, another reason why the Suits in Admiralty Act has no application to this case.

The United States will not have to pay the judgment in this case, and we doubt that it will voluntarily relieve the insurance carrier from its obligation under the policy.

There are four good and sufficient reasons why the United States will not have to pay, to wit:

A. To pay the damages is the personal and direct liability of the agent as an independently liable party.

B. Indemnity and liability insurance protects the United States against loss arising from personal injury or death claims during its operations, and due to its negligence.

C. If the United States was financially interested it would have specially appeared, suggested its inter-

est and moved to dismiss, since the sole remedy would then be under the Suits in Admiralty Act. Its attorney did not do this but let the *defendant* raise the point by motion, supported by the affidavit of the United States Attorney!

D. Brady, the tort-judgment-creditor may proceed in a direct action against the insurance carrier, under the policy, as provided by New York Insurance Law.

The United States is not interested in the outcome of the case. The effort at the trial to show that the judgment would have to be paid by the United States was a mere effort to becloud the issue. Had it been true that the United States was interested because eventually liable to pay, it would have entered the case at the beginning, suggested its interest and moved to dismiss the common law action. It did no such thing and for the manifest reason that the United States was not interested. No United States attorney appeared for the defendant and it is inconceivable that Mr. Collins, District Counsel of the United States Maritime Commission and Special Assistant to the United States Attorney for the Southern District of New York (R. 84) should have failed to protect his client, the United States, by timely suggestion of its interest, and ask that the case proceed under the Suits in Admiralty Act.

It is obvious that the reason he made no such move was because he knew and realized that there was no basis for any claim that the United States would have to pay the judgment.

The defendant made the motion (R. 11-90) and Mr. Collins permitted himself to be called as a witness for the defendant to *testify* that the United States would have to pay the judgment when, if that had been the case, he surely would have appeared in his official capacity, suggested the interest of the United States and requested that the com-

mon law case abate because a suit in admiralty was the exclusive remedy.

And if there had been any basis in fact for the claim that the United States would have to pay the judgment, the attorneys for the steamship company would have insisted that the government appear and suggest its interest.

The defendant agent never would have chanced a jury verdict individually against it when the burden rested on the principal, the United States, which could have had a judge pass upon the issues.

The claim that the United States will have to pay the judgment is specious.

Furthermore, the judgment is against the Roosevelt Steamship Company. The liability policy, insured the Roosevelt Steamship Company as well as the United States. That policy was issued to protect tort-judgment-creditors in making collection of their judgments. Brady would have the right to sue the insurance company to collect the judgment, if the judgment remained unpaid for 30 days after notice of entry given.

New York Insurance Law, Sec. 167 (1-b).

Of course the requirement in the Operating Agreement of a P. & I. policy was not an idle provision. The policy was given. The insurer is liable. The United States is not liable and will not have to pay. The claim to the contrary was injected into the case for no other purpose than an attempt to bring this case within the Suits in Admiralty Act.

And, of course, there is no legal obligation upon the United States, the principal, to re-imburse the Agent for damages occasioned by the Agent's own tort.

Restatement, Law of Agency, Sec. 440 (a);
Cory Bros. v. United States, 51 Fed. (2d) 1010 (10).

CONCLUSION.

The decision of the Circuit Court of Appeals, if sustained, will result in the complete loss of the judgment, because, notwithstanding the adjudication that the remedy is under the Suits in Admiralty Act, no such suit can be brought. The decedent, Brady, was a Customs Inspector and therefore a civil employee of the United States. His widow accepted Federal Employees' Compensation and such acceptance ended her rights except as against a third party.

She has sued such third party because the decisions of this Court gave her that right.

The Roosevelt Steamship Company, as an agent, was liable for its negligent conduct resulting in injury or death, and whether the accident happened on ship or on shore can make no difference as to an action at law or a suit in admiralty, so far as the agent, as an agent, is concerned.

To hold that Quinn, killed on a bridge, can sue an agent at common law, and that if he had been killed on the ship he would have to sue the United States, in admiralty, simply because the accident was on the ship, regardless of the legal liability of the agent for the accident, seems without support either in law or logic.

Yet that is just the effect of the Brady decision. If the agent's negligence had killed Brady on the dock, then his widow could have sued at law, but if the negligence had killed him on the ship, then the suit must be under the Suits in Admiralty Act merely because the government owned the vessel, notwithstanding the Owner was neither liable nor suable.

Such a proposition offends the decisions of this Court and shocks the legal mind.

The old relationship between the Shipping Board Fleet Corporation and its sub-agents has ended.

The decisions dealing with that old relationship cannot illustrate the present-day arrangement, under a new stat-

ute, which specifically requires operation by a private operator.

The inadvertent use of the words "or other agents" in the *Johnson-Lustgarten* decision should not be held to work an amendment to the Suits in Admiralty Act by judicial pronouncement.

No fact in this Brady case makes the Suits in Admiralty Act applicable. The action was properly brought against the agent at common law and the decision of the Circuit Court of Appeals should be reversed and the judgment reinstated.

Respectfuly submitted,

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 269.

MARGARET M. BRADY, as Administratrix of James P. Brady, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

Respondent's brief (p. 8) contains a complaint about the alleged error of the trial judge in excluding certain testimony offered in an effort to establish the ultimate liability of the United States to pay any judgment recovered, on the theory that a tort judgment was considered a part of the "operating expenses" of the vessel.

Respondent's brief (p. 5) further complains that there was a deficiency of proof that the ladder was provided by the defendant, or that the defendant employed the crew, and that its motion to dismiss (R. 83-103) upon those grounds should have been granted.

But, however erroneous either ruling may have been, the defendant waived and abandoned them by not assigning or specifying error thereon in its appeal to the Circuit Court

of Appeals. There was one, and only one, point or question raised by the appellant's brief in that court, and it was thus stated:

"POINT ONE.

The District Court, sitting at common law, did not have jurisdiction of the subject matter".

There was no other point; there was no specification of error upon the exclusion of evidence or the refusal to dismiss on the merits. There was neither argument nor citation in respect of the exclusion of evidence or the denial of the motion to dismiss on merits for failure of proof.

Furthermore, the defendant, for the purpose of its attack upon the jurisdiction of the court, abandoned all contention about who employed the crew or who operated the boat. It rested its fate solely and entirely upon its attack on the jurisdiction.

In defendant counsel's affidavit attached to the application for reargument of the motion to dismiss for lack of jurisdiction, made before the trial, it was said:

> "For the purpose of this motion it may be assumed that the defendant, Roosevelt Steamship Company, Inc., operated and controlled the vessel on which the accident happened, and employed the crew, and that because of this it may be held liable to the plaintiff for negligence . . ." (Parmer's affidavit, R. 42).

At the trial, and after plaintiff had rested, Mr. Parmer renewed his motion and said:

> "Your Honor, I move that the action now pending against the Roosevelt Steamship Company, Inc., be dismissed on the ground that the court has not jurisdiction of the subject matter. My motion is not based upon a contention that Roosevelt Steamship Company

did not control and operate the vessel. I am assuming, for the purpose of this motion, that Roosevelt Steamship Company did operate and control the vessel and employed the members of the crew . . ." (R. 90, bottom).

During a colloquy with the court Mr. Parmer said:

"Well, so far as operation and control of the vessel that, your Honor, should be precluded; but that is not the point I am raising here as to who operated and controlled this vessel. My sole point here is, assuming that the Circuit Court of Appeals is right and that we did operate this vessel and all these people are our agents nevertheless by reason of the contract the government pays the bill eventually, and that is really the point I am making" (R. 87).

The only question presented to the Circuit Court of Appeals was one of jurisdiction. The defendant elected to stand or fall on that one proposition. The concluding *resumé* of the point urged as to why there should be a reversal, was thus stated:

(a) The vessel was owned by and operated "for the United States."

(b) If the vessel had been privately owned a proceeding in admiralty could have been maintained.

(c) The exclusive remedy for the tort is a proceeding against the United States, in admiralty, as a substitute for every other remedy against every other person acting "for the United States" (Appellant's Brief, C. C. A., p. 20).

Not a word was said about failure of proof of negligence or of errors in the exclusion of testimony.

There was just the one, isolated, clear-cut question as to the lack of jurisdiction over the subject-matter which was presented to the Circuit Court of Appeals, and that was the only question decided by that court. The trial judge had approved the verdict both as to propriety and reasonableness and *no attack was made upon the verdict.*

The petitioner (plaintiff below) asked this court to grant certiorari to review the Circuit Court's decision on the question of jurisdiction and certiorari was granted to review that question.

Under the rules and decisions of this court it will not now consider any question not raised in, and presented to, the Circuit Court of Appeals. That rule would entirely remove respondent's Point II, to-wit, that Roosevelt Steamship Company did not employ the crew. That Point should be eliminated from consideration because it was not raised in the court below.

> "Review by this court will be confined to errors alleged in the Petition and this court will not consider questions not raised in the court below, even though certiorari brings up the whole record."
>
> Supreme Court Rule 38, par. 2, following 28 U. S. C. A., Sec. 354.
> Gen'l Talking Corp. v. Western Electric, 304 U. S. 175(1).
> Crown Cork Co. v. Ind. Pier Co., 304 U. S. 159.

But the trial court was right in rejecting evidence which was designed to alter, interpret or change the plain and unambiguous language of the operating agreement. The court was not at liberty either to disregard the words used by the parties, which were descriptive of the subject-matter, or to supply words not made use of, or to permit any modification or novation of the agreement where the

words are simple, clear, non-technical and easily understood.

Norrington v. Wright, 115 U. S. 188.
Harrison v. Portland, 161 U. S. at page 63.
Seitz v. Brewers Ref. Corp., 141 U. S. 510.

"A court is not warranted, under the guise of construction, in importing into a contract an ambiguity which would not exist, by forcing from plain language unusual and unnatural meanings."

Berryhill v. Peoria Life Co., 284 U. S. 488, 492.

"The court may not inquire into the secret or unexpressed intention of one or both of the parties."

Chi. Ry. Co. v. Maryland Casualty, 75 Fed. (2d) 600.

Therefore any evidence as to private practice or bookkeeping arrangements at variance with the contract provisions, was properly rejected.

Persons having business with, or claims against, the vessel would be justified in acting upon the assumption that the agreement meant what it said, to wit, that the Roosevelt Steamship Company was to man, equip, supply and keep the vessel in repair, and actually operate it. If the master of the vessel had made purchases of victuals for the crew, or contracted to have minor repairs made, the United States would be estopped to come in and say that, by private practice, the contract provisions had been abandoned and the ship chandler or the repairman must lose his right to hold the operator liable at common law.

A jury trial is a valuable right. The effort of the Roosevelt Steamship Company to get this case before an admiralty judge was somewhat influenced by its desire to avoid a jury trial (R. 94, bottom) but more particularly

by the realization that, if the common law action could be defeated on jurisdictional grounds, and the plaintiff relegated to admiralty, that would be *an end of the case* because, having accepted compensation, the widow *could not sue the United States, and no damages could be collected.* It was high strategy which conceived that method of defeating this widow and her children.

The exclusion of the offered testimony to vary the terms of the written agreement was entirely right, but whether it was not, the question is not now properly before this court.

The operating agreement was not collaterally involved. It was *directly* involved. It was basic as establishing the relationship of the contracting parties, a condition precedent to the suit, which was really akin to an action for tortious breach of the contract obligation to keep the ship's appliances in good repair (Par. 11, R. 26).

The contract being thus directly involved the decisions, cited by respondent, on the theory that it was but collaterally involved, have no application.

Nor was there any failure to prove that the ship supplied the ladder. When the vessel moved into the dock a ladder was swung by her winches from the ship, over the side, and placed against the ship's rail, the foot of the ladder resting on the dock (R. 62). From such facts it is fairly inferable that it was the ship's ladder—it was in its custody and control and it was handled by the ship's winches and crew.

The Customs Inspectors were in the habit of using such ship's ladder. They were never told not to use them, nor were they prohibited from using them (R. 72-73). If a ladder had been placed by the vessel from rail to dock it was considered to have been put there for use by the inspectors (R. 74, top). The placing of the ladder, plus the knowledge of the habit of these inspectors to hasten aboard the vessel, was an invitation to use.

Respondent's Point II not only attempts to raise fact questions not properly before this court but is an actual attempt on this appeal to have this court, in effect, grant a belated certiorari and posthumously, as it were, review the Quinn decision. In fact the respondent invites this court to consider and to overrule the Quinn case (Respondent's Brief, p. 41, top).

Respondent repeats the error made by the petitioner in the Quinn case, by saying (Brief, p. 26).

> "The Chief Justice of this Court, while Attorney General, expressed the opinion that such agents (of the Fleet Corporation) are not employers of the crews but that the United States is."

In the first place, the opinion referred to (1925) was not written by the present Chief Justice but was prepared by an assistant to the Attorney General. We refrain from naming him.

It was such an erroneous statement of the law that the Comptroller General, in 1930, rendered a contrary opinion, which he based upon the decisions of this court (see Opinion of the Comptroller General, A-31,684).

The question was, whether, under the Shipping Board operating agreements, the crews were employees of the operator or civil employees of the United States. If the latter then they were under the Federal Employees' Compensation Law. The Comptroller General said:

> "Accordingly, in view of the latest rulings of the Supreme Court of the United States, above cited, the form of agreement for 'operation' of ships, and the specific provisions contained in the annual appropriation acts for the purchase of all forms of insurance by the Merchant Fleet Corporation, it is only reasonable to conclude that, under existing law, the Employees Compensation Commission may not enter-

tain, settle, or pay any claims under the Employees Compensation Act by or on behalf of members of the crews of vessels owned or operated by the United States Shipping Board Merchant Fleet Corporation, or the beneficiaries of such who die as the result of such injuries sustained in the course of their employment on such vessels."

The respondent relies upon the *Lustgarten* decision but, singular to note, it carefully does not mention the *Sloan Shipyards* case anywhere in its brief.

It vehemently argues that, under the *Lustgarten* case, if the government owns the vessel and it is operated by any agent "for the United States", *ipso facto* the exclusive remedy for any maritime cause of action is under the Suits in Admiralty Act.

All right to sue an agent at law for his own negligent conduct in the operation of the vessel, is gone.

All right to inquire into the contractual relationship between the United States, as owner, and the operator, is gone.

Once let it appear that the government owns the vessel, and that some agent, be he public, private or independent contractor, operates it for the owner, then *instanter* all direct recourse against the agent ceases, if the tort happened to have been maritime.

Respondent would have it that the *Lustgarten* decision has thrown the *Sloan Shipyards* case into the discard, and with it went all the other cases in which this court gave a right to sue an agent for the consequences of his own torts, even maritime.

We say that the *Lustgarten* decision has no such effect and was never intended to extend beyond the factual relationship as revealed in that record—a public agent, through a sub-public-agent, operating in the performance of a governmental function, and for whose breaches and torts the United States had to pay out of its own Treasury.

This court laid down this test: If the government will have to pay the judgment then it is the real party in interest and the exclusive remedy is in Admiralty.

And it was upon this theory that this respondent undertook to prove in the trial court that the government would have to pay the Brady judgment. Let us advert to that effort:

The suit was commenced in the state court May 31, 1940.

It was removed to the federal court on July 19, 1940.

Answer was served on July 24, 1940 (R. 1).

The answer admitted only the fact that the defendant was a Delaware corporation, and denied each and every other allegation. It set up only two defenses, to wit, contributory negligence and assumption of risk (R. 7-10).

Although Mr. Collins, the Special Assistant to the Attorney General and District Counsel of the Maritime Commission (R. 84) testified:

> "I have received instructions to object to the bringing of this case at common law as contrary to the policy of the government in these matters . . ." (R. 85, top),

nevertheless, he did not appear specially and suggest the interest of the United States, and ask the dismissal of the action, as he should have done. He took no affirmative step.

As the case approached trial, and about ten months after issue joined, the defendant, Roosevelt Steamship Company —not Collins—through its own personal counsel, moved (May, 1941) to dismiss the complaint upon the ground that the government would have to pay the eventual recovery, therefore the exclusive remedy was under the Suits in Admiralty Act. In that proceeding Collins did allow himself to be used by the defendant to bolster its motion, for he appeared as a mere witness, not as Special Assistant to the Attorney General and District Counsel for the Maritime Commission acting under instructions to dismiss the

common law action. He made no motion in his official capacity.

It seems to us that if Collins had been instructed by his superiors to object to the common law action he would have done something personally and promptly and not have been content to occupy the secondary role of a mere witness and let private counsel perform the duties of government counsel.

In this Brady case there was no factual proof in evidence that the government would have to pay the judgment. Collins' mere *ipse dixit* was not sufficient. The insurance policy was not in evidence so this court should disregard counsel's *offer to prove* that a "deductible" was assumed by the government as evidence of the fact (R. 89, bottom). That statement in the *offer to prove* is not evidence.

The petitioner is not "embarrassed by the Lustgarten case" as claimed in respondent's brief (p. 24). Were it not for the Sloan Shipyards case, and others in this court to the same effect, petitioner might be uncertain of her rights, but the *Lustgarten* case does not deprive petitioner of her right to proceed at law against an agent for damages attributable to the agent's own negligence, even if the vessel was owned by the United States and it was operated for the United States.

True, the opinion in the Lustgarten case said ". . . the remedies given by the Act are exclusive in all cases where a libel might be filed under it", but that language must be considered in its context and with due regard to the question before the court. In that case the public agent and its sub-agent were admittedly indemnified by the United States, and the government would have to pay the judgment. That fact was the determining factor in making the government the real party in interest. There was no question there of an independent or private operator. The public agency character of the Fleet Corporation and the operating company was conceded.

It was to get away from any possibility that the Roosevelt Steamship Company, and other operators, might be considered to be a "public" agent like the Colonial Navigation Company in the *Lustgarten* case, that the Congress was careful to characterize the operators under the new Merchant Marine Act as "private operators" in contradistinction to the "public operators" under the old Fleet Corporation set-up.

The test is the responsibility of the United States to pay the judgment. That absent, the United States is not interested.

What cares the United States if the Roosevelt Steamship Company is sued and has to pay for its own negligence?

What cares the United States whether its operator is sued at law or in admiralty, so long as it is not financially affected?

Since our brief was printed we have seen a critical review of the *Brady* decision in the Harvard Law Review. It so clearly points out the error of the Circuit Court of Appeals that we borrow, adopt and quote its language:

> "Had the vessel been privately owned, it is clear that the contract operator would be liable either at law or in admiralty. *The Barnstable*, 181 U. S. 464 (1901). The primary purpose of the Act, under which the instant court denied the plaintiff a remedy at law, is to prevent libels against Government ships by substituting a libel *in personam* against the United States. . . . This Act has been held to provide the exclusive remedy against the United States and its agencies. *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320 (1930); *cf. United States Emergency Fleet Corp.* v. *Rosenberg Bros. & Co.*, 276 U. S. 202 (1928); See Note (1930), Yale L. J. 1189. In the instant case the court rests its result squarely upon the decision in one of the cases considered along with the *Johnson* case wherein the court

reversed a judgment at law in favor of a seaman against both the Fleet Corporation and the operating company. *United States Shipping Board Emergency Fleet Corp.* v. *Lustgarten*, 280 U. S. 320 (1930). The case is clearly distinguishable, however, since in the *Johnson* case the Supreme Court stated that the United States would be ultimately liable for any judgment—apparently accepting the defendant's contention that the operating company was not a contract operator, but a public agent of the United States, and as such immune from ultimate liability. See Brief for Petitioners, pages 28-29, *United States Shipping Board Emergency Fleet Corp.* v. *Lustgarten, supra.* Whereas the operating agreement in the present case might have been similarly construed, the court assumed that a judgment against the defendant would not be equivalent to a judgment against the United States, nor would it be paid by the United States under the operating contract. Thus construed, the decision clearly goes far beyond the Supreme Court's interpretation of the Act. *Cf. Odgaard* v. *Cosmopolitan Shipping Co.*, 171 Misc. 244; 12 N. Y. S. (2d) 389 (Sup. Ct. 1939) (contra to instant case)? The decision allows a tortfeasor to escape liability, since the Suits in Admiralty Act provides a remedy only against the United States. Furthermore even if the United States might be liable on these facts, the plaintiff in the instant case has no remedy because she accepted compensation from the United States Employees' Compensation Commission. *Dahn* v. *Davis*, 258 U. S. 421 (1922); see Record, p. 116, *Brady* v. *Roosevelt Steamship Company, supra.* Such consequences are not indicated by precedent, and seem clearly not to have been within the contemplation of Congress in enacting the legislation."

Harvard Law Review, October, 1942, page 305.

If the bare fact that the vessel was government-owned, and the tort maritime, is sufficient, without more, to make the Suits in Admiralty Act apply, then the decision of the Circuit Court of Appeals was not erroneous.

If the decision in the *Sloan Shipyards* case, and others holding similarly, are no longer valid law, then the decision of the Circuit Court of Appeals was not erroneous.

If a law court has entirely lost jurisdiction over maritime tort actions against private corporations for damages for its own negligent conduct as an agent, then the decision of the Circuit Court of Appeals was not erroneous.

As we understand it, the law is:

Where an agent while operating a merchant vessel for the United States commits a maritime tort, and the government must pay the damages, then the exclusive remedy is under the Suits in Admiralty Act.

But where such tort is that of an agent, even though operating a merchant vessel for the United States, and where such agent may be held personally liable for the damages, and which damages the United States is under no legal obligation to pay, or reimburse, then suit may be brought directly against the agent, either at law or in admiralty.

Respectfully submitted,

SIMONE N. GAZAN,
Counsel for Petitioner.

AUGUST P. KLEIN,
BENJAMIN H. SIFF,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 269.

MARGARET M. BRADY, as Administratrix of James P. Brady, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM IN OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING.

SIMONE N. GAZAN
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MEMORANDUM IN OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING.

POINT ONE.

It is true that on the trial of this case in the District Court the defendant moved to dismiss the complaint on the ground that there had been a failure of proof of a cause of action against the defendant. These motions were overruled and exceptions taken.

In addition to these motions to dismiss for insufficiency of proof of facts to establish a cause of action, the defendant also moved to dismiss the complaint upon the ground

that *the court was without jurisdiction because the exclusive remedy was in admiralty under the Suits in Admiralty Act.* This motion also was denied.

However, after an adverse verdict on the facts, duly approved by the trial judge, the defendant, in prosecuting its appeal to the Circuit Court of Appeals, *waived* and *abandoned* its point that there had been insufficiency of proof of facts to establish a cause of action, by not assigning error thereon, or arguing that point in its brief.

In the Appellant's brief in the Circuit Court of Appeals the trial rulings were mentioned only as a part of the historical statement of what had transpired in the court below, but there never was any specification of error that the court below had erred in refusing to dismiss the cause of action for failure of proof, nor was there any assignment of error in the Circuit Court of Appeals complaining of any error on the part of the trial judge, *other than the refusal to dismiss the case for lack of jurisdiction.*

We invite the court to read Petitioner's Reply Brief, pages 1-4, filed in this court, which sets forth fully the record and the law which would estop the Respondent herein from raising, in this court, any error claimed to have been committed by the trial court and which was not made the subject matter of assignment of error in the Circuit Court of Appeals.

The defendant below, the Respondent here, was quite content to rely *solely upon the one alleged error*, to wit, that the court was without jurisdiction because the suit should have proceeded in admiralty. That was the only point raised and argued before the Circuit Court of Appeals; that was the only point decided by the Circuit Court of Appeals, and to attack *that* ruling the Petitioner herein sought a review.

This court granted certiorari to review that point.

True, the Respondent, once the certiorari was granted, attempted to raise in this court the questions raised in the trial court, but which were not presented to the intermediate Circuit Court of Appeals.

This court properly ignored the attempt by the Respondent to have this court review the trial court rulings which had been abandoned and waived by the defendant below because not raised in the Circuit Court of Appeals.

> "Review by this court will be confined to errors alleged in the Petition and this court will not consider questions not raised in the court below, even though certiorari brings up the whole record."

Supreme Court Rule 38, par. 2, following 28 U. S. C. A., Sec. 354;
Gen'l Talking Corp. v. Western Electric, 304 U. S. 175 (1);
Crown Cork Co. v. Ind. Pier Co., 304 U. S. 159.

POINT TWO.

We do feel that a modification of this court's opinion might be considered because we do not see the necessity for sending the cause back to the Circuit Court of Appeals to determine whether factual proof of a cause of action against Respondent had been made. The Circuit Court of Appeals should not go into that question because it is foreclosed by a long line of decisions which hold that verdicts, supported by evidence, and approved by the trial judge, will not be disturbed on appeal, and, furthermore, no point was raised before it by the Appellant therein (Respondent here) that the verdict was without evidence to support it. The only question before the Circuit Court of Appeals was one of jurisdiction. That was the only point mentioned in Appellant's brief and the only question argued in Appellant's brief, and consequently was the only question decided by the Circuit Court of Appeals. The Circuit Court of Appeals did not decide any factual question because it was not before it.

We ask that the concluding paragraph of this court's opinion be modified to the extent of reversing the deci-

sion of the Circuit Court of Appeals and reinstating the judgment, without presenting to the Circuit Court of Appeals a question for decision which had not previously been raised before it, and which had been abandoned by the Appellant.

There is ample precedent for this.

Keys v. Pennsylvania Railroad, 308 U. S. 529;
Skelly v. N. Y., N. H. & H. R. Co., 93 Fed. (2d) 479 (4);
Bernstein v. Greenfield, 281 N. Y. 77.

To grant the request of the Respondent as made in its Petition for Rehearing, would be equivalent to sending this case back for a re-trial on the facts when those questions were settled by a jury and approved by the trial court, and as to which neither specification nor assignment of error was made on appeal.

Having abandoned all alleged errors on the trial, except the denial of its motion which attacked the jurisdiction of the court, this Respondent is entitled neither as favor nor right to a re-trial of the factual issues before this court, before the Circuit Court of Appeals or before the trial court. That question is *res judicata*.

We feel that this court, having reversed the only question of law properly before it, that a direction that the judgment be reinstated would be in order, and we ask that the opinion be modified to that extent.

Respectfully submitted,

SIMONE N. GAZAN,
Counsel for Petitioner.

AUGUST P. KLEIN,
BENJAMIN H. SIFF,
of Counsel.

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IN THE

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OCTOBER TERM, 1942.

No. 269

MARGARET M. BRADY, as Administratrix of JAMES P. BRADY, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A. THE REAL QUESTION INVOLVED HEREIN.

The real question presented by this petition is whether there is any reason for this court to change the sensible construction of the Suits in Admiralty Act, 46 U. S. C. 741, *et seq.*, which this court made in 1930, which has been followed ever since by bench and bar, which was followed by the Circuit Court of Appeals in the case at bar, and which at the present moment is being used as a point of departure in current legislation.

This court construed the Suits in Admiralty Act in the cases of *Johnson* v. *U. S. Shipping Board Emergency Fleet Corporation* and *U. S. Shipping Board Emergency Fleet Corporation* v. *Lustgarten*, 280 U. S. 320. That was in 1930.

In substance, this court said that Congress had provided that thereafter neither the United States, nor a corporation

whose stock was wholly owned by the United States, nor a private corporation which was operating a vessel for the United States, could be sued at common law for a maritime tort. For all remedies which had existed up to the time of the passage of that act against any of the above-mentioned entities Congress had substituted an action in Admiralty, which might be brought against either the United States or against its wholly owned corporation, "as the case may be".

This court not only said but held (for the precise point was involved) that the private operating agent for the United States was immune from suit.

Accordingly, it directed that the judgment which had been obtained in that case against the private operating corporation be reversed and the cause "remanded with directions to dismiss." 280 U. S. 320, 327.

Thereafter, in deference to this court's direction, the judgment, which was against the private operating corporation as well as against the Government-owned corporation, was vacated and the action dismissed. The plaintiff then sued the United States in Admiralty. *Lustgarten* v. *United States*, 5 F. Sup. 746. He obtained a decree for maintenance and cure in the sum of $784, but the case went against him on the merits on the causes of action for negligence.

However, the common-law judgment which the plaintiff had obtained in the *Lustgarten* case against the private operating corporation, and which had been reversed by this court, was not simply for a seaman's maintenance and cure, as Judge Clark has asserted in his dissenting opinion below, and as the petitioner now asserts in his brief, R. 52, Petitioner's Brief, page 20. The judgment was for a tort caused by negligence and was in the sum of $10,226.50. 280 U. S. 320, at 323; Lustgarten Record, at page 34.

The Supreme Court, in holding that the private operating agent for the United States could not be sued, did not, as Judge Clark has said, refer to it "only summarily as 'other agents.'" The Supreme Court said the following, and what was said referred necessarily and pointedly to the private operating agent involved in the *Lustgarten* case, against whom there had been rendered a tort judgment for a substantial sum of money:

> "Putting the United States and the Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation *or other agents* for enforcement of the maritime causes of action covered by the Act. Such a failure of purpose on the part of the Congress is not readily to be inferred. We conclude that the remedies given by the Act are exclusive in all cases where a libel might be filed under it." (Italics ours.)

The Supreme Court did not, as intimated by Judge Clark, reverse the judgment against the operating agent through inadvertence. Not only the opinion, but the syllabus as well, shows that the court knew well that the judgment was against both the United States Shipping Board Emergency Fleet Corporation, a Government-owned corporation, and against Consolidated Navigation Company, Inc. a private operating agent. When the Supreme Court reversed this judgment and directed a dismissal, undoubtedly it intended the result which it directed.

Ever since that decision it has been well understood that private operators of Government vessels who are act-

ing as agents for the United States are not suable for maritime torts. The United States has been sued in the place of its agent.

The Court of Appeals of New York understood this. *Shea* v. *Export Steamship Corporation*, 253 N. Y. 17. There, a judgment against a private operating agent was reversed and the complaint dismissed.

The Circuit Court of Appeals for the Second Circuit understood it, for the complaint in the *Lustgarten* case was dismissed. *Lustgarten* v. *United States*, 5 F. Supp. 746.

Bench and bar have understood it, for, although there have been numerous suits against the United States in Admiralty for maritime torts occurring on vessels operated for the United States by private operating agents, and, although there have been numerous decrees against the United States, there has not been, until the present case, any judgment for a maritime tort against a private operator for the United States.

The judgment in the case at bar was permitted to be rendered because the District Court judge did not fully understand the point involved. He thought that the question was whether the private operating agent, or its servants, had committed the tort, and thought that the case was governed by the case of *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190. R. 126. He did not understand that the question was one of jurisdiction, that is, whether, assuming that the private operating agent or its servants had committed the tort, suit should have been brought only against the United States in Admiralty under the Suits in Admiralty Act.

All of the judges of the Circuit Court of Appeals, including Judge Clark, who dissented, understood that the question which was involved was one relating to jurisdiction. Two of the judges, Chase and Augustus Hand, reversed, on the ground that the court below did not have

jurisdiction by reason of the provisions of the Suits in Admiralty Act as construed in the *Johnson* and *Lustgarten* cases, 280 U. S. 320. Judge Clark dissented, on the ground that he did not think that the Supreme Court, notwithstanding what it had said and done in those cases, had intended such a construction. Putting it shortly, Judge Clark did not think that the Supreme Court had meant what it said. On the other hand, the majority of the court felt that it had.

As already pointed out, Judge Clark was wrong on the facts of the *Lustgarten* case. If he had appreciated that the private operating agent in that case had been adjudged liable in the sum of $10,226.50 for a tort caused by negligence, it is likely that he would not have dissented.

At this very moment Congress has before it a bill which is designed to extend still further the immunity granted by the Suits in Admiralty Act. This is known as the Bland Omnibus Bill, H. R. 7424, Senate 2695, introduced in the House on July 21, 1942. Hearings have been held. The War Shipping Administration through its Administrator and its General Counsel has advocated its passage. Probably it will be law by the time this petition is heard. The pertinent provisions of the bill are as follows:

> "That all seamen employed by or on behalf of the United States through the War Shipping Administration, or agents or other persons acting for or on behalf of the War Shipping Administration, shall, with respect to (1) death, injuries, illness, loss of effects, detention, or repatriation, or claims arising therefrom; (2) the Federal social security laws and Federal employment tax laws; and (3) allotments, have all of the rights, benefits, exemptions, privileges and liabilities of seamen employed on privately owned and operated American vessels.
>
> * * * * * * *

> "Any claim referred to in clause (1) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act."

It is to be noted that the exclusive jurisdiction of Admiralty over maritime torts to seamen on Government vessels is being extended to cover not only seamen employed by agents of the War Shipping Administration, but by "other persons acting for or on behalf of the War Shipping Administration."

This has become necessary because of the fact that Government vessels are now being operated not only by private operators who are agents for the United States but by so-called bare-boat charterers. That term, in the ordinary commercial sense, does not denote the existence of the relationship of principal and agent. A bare-boat charterer, commercially, acts for himself. However, a bare-boat charterer, acting for the War Shipping Administration, is a different matter. Nominally he is a bare-boat charterer, but, actually, he is acting for the United States.

On account of this situation and others like it the Suits in Admiralty Act is in the course of being amended as above set forth in order to carry still further the policy of Congress as recognized and defined by this court in the *Johnson* and *Lustgarten* cases. Essentially, that policy is based on a full appreciation that ships cannot be operated without causing injury for which the injured persons will demand compensation. For the United States to submit to all of the burdens of litigation imposed on a private operator is expensive and unnecessary. To permit its agents or other private persons or corporations acting for it to submit to such burdens is also unnecessary and expensive.

Moreover, it is expensive to the United States. As a business matter, the expense of tort litigation, including the expense for the payment of judgments, is regarded as an operating expense. It is, therefore, among the expenses which the United States must bear when it agrees to reimburse its agent or other person for his operating expenses. Therefore, the United States, acting in its own self-interest, substitutes itself as the exclusive defendant. By so doing it deals fairly with injured persons, and at the same time reserves to itself the power of direct control over litigation and its inevitable expense.

Clearly, therefore, the decision of the Circuit Court of Appeals below is not only in line with the decision of this court made in 1930, but also in line with current legislative thinking. It is submitted that the times, if nothing else, call for a denial of the petition.

B. Petitioner's Grounds for Review.

1. *Independent Agents and Agents.*

It is to be noted that the principal ground on which the petitioner seeks a review is one which none of the judges below, including the dissenting judge, would have approved. So far as can be gathered from the opinions below, all of the judges were agreed that Roosevelt Steamship Company was an operating agent for the United States in the same sense that the Consolidated Navigation Company was in the *Lustgarten* case (R. 151). Judge Clark dissented solely on the ground that the Suits in Admiralty Act, as construed by this court, did not give such operating agents immunity.

On the other hand, petitioner says that the operating agent here is not the same kind of an agent as was involved in the *Lustgarten* case. He says that the operating agent below was an "independent agent". R. 6, 8. For emphasis

he refers to it as a "private operator", (R. 3, 6) and even goes so far as to say that it is a bare-boat charterer and owner *pro hac vice* in the commercial sense. R. 5, 27. According to petitioner, the operating agent in the *Lustgarten* case was just an agent. R. 20. Therefore, petitioner argues that the *Lustgarten* case and the principles there announced do not apply here, and that the Circuit Court was wrong in the application of the law to a particular case. To correct such an error, *certiorari* is asked.

Of course, there is not any difference between the operating agent in the *Lustgarten* case and the operating agent here. As observed, all of the judges in the Circuit Court of Appeals were agreed on that. If there should be any question with respect to it, it is necessary only to compare the operating agreement in the case at bar with the operating agreement in the *Lustgarten* case. The latter can be found at pages 329 to 337 in the record of that case.

We submit in an appendix, p. 24, a schedule of pertinent provisions of both contracts, endeavoring to group them in such a way as to show that the provisions of one contract are essentially the same as those of the other. It will be seen that, by virtue of the provisions of both contracts, profits and losses belonged to the United States. However, whereas in the contract in the *Lustgarten* case the operating agent was permitted to earn certain fees which might be considered remunerative, the operating agent in the case at bar received nothing at all for the work it did except the payment of operating expenses and overhead. Strange as it may seem, the contract in this case did not provide that the operating agent should receive anything for its services. No doubt, the good relations established by this contract put it in a favorable position for obtaining a more favorable contract when the Maritime Commission was ready to sell or charter the vessels.

2. *The Merchant Marine Act of 1936.*

The petitioner resorts to another expedient in a vain attempt to construct a difference between the operating agent in the *Lustgarten* case and the operating agent below. He says that the Merchant Marine Act of 1936 changed everything. Specifically, the petitioner says:

> "The Merchant Marine Act of 1936 established a new relationship with operating agents." Brief 21.
>
> "* * * the Merchant Marine Act of 1936, in directing the Maritime Commission to procure the operation of its vessels by 'private operators', thereby superseded the Suits in Admiralty Act which contemplated a situation where Government-owned corporations, and not private independent contractors, operated the vessels." Brief 23.

This is simply untrue. The Merchant Marine Act did not make such a change. The Suits in Admiralty Act did not contemplate operation only by Government-owned corporations. It did contemplate operation by private operators for the United States. The *Lustgarten* case shows this. Moreover, the Merchant Marine Act contemplated that private operators were already acting for the United States when the Merchant Marine Act of 1936 was passed and that they should continue to act in the same capacity thereafter and until arrangements of a different sort could be made.

The operating agent in the case at bar was such a private operator. It had operated Government vessels before the Merchant Marine Act had been passed. R. 29. It continued to operate the same vessels after the Merchant Marine Act was passed, pursuant to the contract involved in this case. R. 29.

Moreover, all of this is clearly set forth in the statute itself, which shows that the words "private operator", as

used in the Merchant Marine Act, did not, as petitioner asserts, inaugurate a new dispensation, but merely continued existing arrangements temporarily.

The statute provides as follows (46 U. S. C. 1194):

> "All vessels transferred to or otherwise acquired by the Commission in any manner may be chartered or sold by the Commission pursuant to the further provisions of this chapter. All vessels transferred to the Commission by this chapter, *and now being operated by private operators on lines in foreign commerce of the United States*, shall be temporarily operated by the Commission for its account by private operators until such time and upon such operating agreements as the Commission may deem advantageous, but the Commission shall arrange as soon as practicable to offer all such lines of vessels for charter as hereinafter provided, preference to be given to present operators, and all operation of the Commission's vessels by private operators under such operating agreements shall be discontinued within one year after June 29, 1936, * * *." (Italics ours.)

Significantly, this part of the statute has been omitted by petitioner.

It also provides (46 U. S. C. 1197):

> (a) * * *
>
> (b) * * *.
>
> (c) "If the highest bid is rejected, the Commission may award the charter to the next highest bidder, or may reject all bids and readvertise the line: Provided, however, That the Commission may operate the line until conditions appear to be more favorable for a reoffering of the line for private charter."

The petitioner is really inconsistent. On page 3 of his brief he correctly recognizes that the contract of the private operator in this case was a temporary operating arrangement pending the making of a satisfactory sale or charter. However, on page 5 of his brief he says that the agreement was substantially a bare-boat charter. Of course, he is wrong in the latter statement. The agreement is not even remotely similar to a bare-boat charter, and was entered into, pursuant to statute, because chartering was impossible. R. 29.

It is clear, therefore, that Roosevelt Steamship Company, the operating agent in the case at bar, was the same kind of operating agent as the operating agent in the *Lustgarten* case, and that the Circuit Court of Appeals was correct in applying to it the rule announced therein.

3. *The obligation of the United States to reimburse its agent.*

The petitioner's argument that the operating agent here is different from the operating agent in the Lustgarten case is put in several different forms. For instance, the petitioner says that there is no legal obligation on the United States to reimburse the operating agent in the case at bar for damages paid as a result of its own negligence. Petitioner's Brief, page 18.

This harks back to the *Lustgarten* case, where this court said, at page 326:

> "On the facts above stated, it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions. §8, Suits in Admiralty Act; 46 U. S. C. §748. Cf. Minnesota *v.* Hitchcock, 185 U. S. 373, 387."

In this case, says the petitioner, the money to pay the judgment will not come "mediately" from the United States, and, therefore, the operating agent here is not like the operating agent in the Lustgarten case.

Judge Clark was attracted by this argument. R. 153. However, as already noted, Judge Clark and the petitioner have wrongly assumed that the judgment in the Lustgarten case was for maintenance and cure only. They failed to perceive that the judgment in that case was really for a tort caused by the agent's negligence and that the Supreme Court, when it said that the money to pay the judgment would come out of the United States, meant that the United States had contracted to pay it.

The contract in that case provided that the United States should pay the operating expenses incurred by the agent. Lustgarten Record, 330. Tort judgments on account of negligence are among the operating expenses of operating steamships, and the Supreme Court recognized them as such in that case.

So, in the case at bar. The United States agreed to pay the operating expenses (R. 33) and, therefore, agreed to reimburse the agent for money spent by the operating agent in paying judgments for tort caused by negligence.

Of course, generally speaking, there is not any obligation on the part of a principal to indemnify an agent if the latter is required to pay a judgment based on negligence. However, such an obligation, like any other, can arise by express contract or by implication in fact. In the case at bar as in the *Lustgarten* case it arises by express contract.

Among the "facts" to which the Supreme Court must have referred when it said that the money to pay the tort judgment in that case would come out of the United States were the provisions of the operating contract. Thus, the

Supreme Court said, in giving the facts on which the decision in the *Lustgarten* case was based (280 U. S. 322):

> "March 6, 1926, the steamship *Coelleda* was a merchant vessel owned by the United States and *operated for it by the Navigation Company as agent pursuant to an agreement* made by the United States acting through the Shipping Board represented by the Fleet Corporation. Merchant Marine Act 1920, §§12, 35, 41 Stat. 993, 1007; 46 U. S. C., §§871, 886. Respondent was a seaman employed thereon. This is an action at law brought by him in the United States District Court, Southern District of New York, against the Fleet Corporation and the Navigation Company, to recover damages for injuries alleged to have been sustained by him while in that service." (Italics ours.)

On the trial below, counsel for Roosevelt Steamship Co. Inc., the operating agent, anticipated correctly that counsel for the petitioner would claim that the phrase "expenses, except overhead, incident to the management, operation" does not include expenses caused by judgments based on negligence. R. 334, 33. Therefore, and in order to remove any uncertainty or ambiguity which might result if such a contention were made, the operating agent offered evidence as to what the parties to the contract meant by the words they had used (R. 336). William E. Collins, District Counsel at New York for the United States Maritime Commission, and Special Assistant to the United States Attorney in Admiralty matters, objected to the maintenance of the action against the operating agent, on the ground that the United States would have to pay any judgment which was rendered. R. 107-110. Mr. Collins, of course, did not appear for the United States in the action. In this circumstance petitioner sees a strange significance. Petitioner's

Brief, page 18. However, there was nothing strange about it. Mr. Collins could not appear for the United States in the action. The United States was not a party, and could not become a party to a common law action in which the plaintiff chose only to name the operating agent as a defendant.

In addition to Mr. Collins, the operating agent produced the certifying officer of the Maritime Commission and counsel for the operating agent offered to prove through him that judgments for tort against the operating agent were among the operating expenses paid by the United States in actual practice. This evidence was refused. R. 112, 113.

Notwithstanding this offer of evidence and respondent's claim of error in the refusal of the trial court to permit the operating agent to show the vital matter of the usage between the parties, Judge Clark decided the matter out of hand in the following two sentences (R. 153):

> "We are not dealing with operating expenses for which the United States must provide the money under the operating contract, but for wrongdoing —negligence—of the operator. * * *. Counsel suggested that the government in fact would provide reimbursement to the operator here; but that would seem favor, not right."

In so doing, Judge Clark committed a double error. First, he was wrong as to the facts of the *Lustgarten* case where the Supreme Court had held that expenses caused by "wrongdoing—negligence—of the operator" were among the operating expenses which the United States was obliged to pay. Second, he denied to the operating agent its day in court by foreclosing it in the matter of proof. It would seem, therefore, that if the point raised by Judge

Clark were to gain the consideration of this court, the respondent should be accorded at some stage of the proceedings an opportunity to be heard and to have decided its claim of error with respect to the refusal of the above mentioned evidence.

Fortunately, the refusal of this evidence offered by the operating agent was not harmful. The majority of the Circuit Court of Appeals held that the existence or nonexistence of a right of the operating agent to reimbursement by the United States was not decisive. R. 151. The Circuit Court of Appeals did not, as the petitioner says, hold that in this case there was not such a right of reimbursement. It held that it did not matter whether there was or not. R. 151. What mattered was that the vessel which was involved was operated "by or for the United States." R. 151.

This is the statutory criterion for the application of the statute. 46 U. S. C. §741, 742. It is the criterion used by this court in the *Lustgarten* case, 280 U. S. 326. The matter of indemnification of the agent by the United States, after all, is not and could not, in the nature of things, be a satisfactory criterion for the application of the Suits in Admiralty Act. Nor, it is submitted, did the Supreme Court, when it referred to such an obligation in the *Lustgarten* case, mean to make it the criterion. It is obvious that the court meant merely to indicate one of the reasons for the policy of Congress which the act was designed to implement. 280 U. S. 320 at 326.

4. *Insurance.*

Closely allied with petitioner's argument based on an asserted absence of the agent's right of reimbursement are petitioner's statements that neither the United States nor the operating agent will have to pay the judgment because

an insurance company is obliged to pay it by contract. Such statements are wholly unsupported by the record.

In the first place, petitioner says that the operating contract between the United States and the operating agent required the latter to procure liability insurance to indemnify itself against damage suits. Petitioner's Brief, p. 17. However, the contract does not so provide. It provides that the operating agent must obtain such insurance to protect the United States. The words of the contract are that "the Managing Agent shall provide, *for the account of the Owner* and subject to its approval, Protection and Indemnity, and such other forms of insurance as the Owner may deem necessary." (Italics ours.) There is no other provision in the contract with respect to such insurance. R. 37. Moreover, this is all the evidence there is in the record with respect to insurance. Specifically, there is no evidence to show that insurance was actually obtained covering either the United States or the operating agent, and, if so, what the provisions of such a policy were.

The petitioner has simply assumed that the United States and Roosevelt Steamship Company, Inc. were fully covered by insurance. But counsel for Roosevelt Steamship Company, Inc. asserted on the trial that such was not the case, that he was ready to prove it, and that, by reason of a so-called "deductible clause" the United States was a co-insurer. R. 115. Therefore, as a matter of cold fact, the United States was financially interested, without expectation of reimbursement by an insurer, in the first part of any judgment which might be rendered. R. 115.

In addition, it did not follow from the false assumption that there was full insurance that the United States would not be financially interested. Counsel for the operating agent asserted that the judgment had to be paid first before

the insurer could be called on for reimbursement, and that he was ready to prove it. R. 115. Since, as between the United States and the operating agent, the United States had to reimburse the agent, the actual practice was for the United States to issue a United States check and then to submit its claim for reimbursement to the insurance company. R. 115. Therefore, the United States was financially interested in the whole judgment. It had to pay it before it could obtain even partial reimbursement.

Actually, it was wholly irrelevant to that financial interest that either the United States or the operating agent had a contract with an insurance company for either whole or partial reimbursement. The insurance company might default. Furthermore, anyone who is familiar with protection and indemnity insurance knows that it is on a mutual basis. The loss record of the United States or any other shipowner in one year influences the premium payments it has to make in the year following.

It is not to be wondered at, therefore, that the Circuit Court of Appeals relied on the *Lustgarten* decision and held that the exclusive jurisdiction of Admiralty depended solely on whether the vessel involved was being operated "by or for the United States." The petitioner was contending, and, seemingly, still contends, that such jurisdiction should depend on the provisions of an insurance policy which the petitioner did not take the trouble to even prove!

The petitioner's contention with respect to the operating agent's obligation to furnish a bond for faithful performance is of the same piece. Petition, pp. 4, 7. It has nothing to do with the matter. The operating agent in the *Lustgarten* case was also obliged to furnish a bond for faithful performance (Lustgarten Record, 336) but the Supreme Court held that it was not liable for the tort.

C. Certain Subordinate Contentions.

There are several subordinate matters which the petitioner sets forth in the petition, which are also irrelevant, but which may cause confusion unless explained.

1. First, petitioner complains that the Circuit Court of Appeals failed to note that the petitioner could not sue the United States under the Suits in Admiralty Act because she had accepted compensation from the United States under the Federal Employees' Compensation Act. Therefore, says the petitioner, the Circuit Court of Appeals was wrong because it directed the petitioner along a road which does not exist.

However, the petitioner has gotten the cart before the horse. The Circuit Court of Appeals did not say that the petitioner could sue the United States under the Suits in Admiralty Act. It held that the petitioner could not sue the agent. The exact legal situation is as follows:

When the death of petitioner's intestate occurred she had two ways of obtaining money. Since her husband was a customs inspector and a civil employee of the United States she was entitled to compensation under the U. S. Employees' Compensation Act. 5 U. S. C., §751 *et seq.* She was also entitled to sue the United States under the Suits in Admiralty Act and to claim therein that the United States was liable because those acting for the United States had caused the death of her husband by negligence.

However, petitioner was not entitled to both of these remedies. It was incumbent on her to elect which one she would take. *Dahn* v. *Davis*, 258 U. S. 421.

The petitioner elected to obtain compensation from the United States and in so doing voluntarily relinquished her right to sue the United States under the Suits in Ad-

miralty Act. R. 114, 115. This suit actually represents an attempt to avoid the effect of that relinquishment by suing the agent of the United States.

The Circuit Court of Appeals therefore has not held that the petitioner should now sue the United States in Admiralty rather than the agent of the United States at common law. It has held in effect that, if the petitioner had a cause of action arising out of the death of her husband, suit should have been brought against the United States in Admiralty.

There is no doubt that the petitioner could have done this. She chose not to do it and thereby obtained the certain remedy of compensation as compared with the uncertain remedy of *tort* litigation. Under the law she is entitled to compensation for the rest of her life.

2. The petitioner has included as Exhibit A a letter of the U. S. Employees' Compensation Commission in which it is said "That body is interested in having the decision below reviewed, as the same may affect action of this Commission in numerous other cases arising under the Federal Employees' Compensation Act." Just how the action of the Employees' Compensation Commission might be affected remains obscure. Apparently, the only interest of the United States Employees' Compensation Commission is financial. If the petitioner recovers a judgment she must use it to reimburse the Employees' Compensation Commission for such sums as have been paid her, or may be paid her in the future.

Seemingly, in order to indicate that there is some other reason for the interest of the United States Employees' Compensation Commission, petitioner says, on page 7, that the United States Employees' Compensation Act authorizes

a suit against a third person to collect damages caused by a tort. The petitioner then asks whether the decision of the Circuit Court of Appeals below shall be permitted to nullify the United States Employees' Compensation Act. Petition, p. 7.

It will be noted that the Employees' Compensation Act does not "authorize" a suit against a third party. It provides merely that where a person entitled to compensation has a cause of action against a third party the United States may require an assignment of that cause of action to the United States or may permit the person to sue. If there is a recovery, it benefits the United States Employees' Compensation Commission which, in that case, does not have to pay so much compensation. 5 U. S. C. §§776, 777(A).

3. On pages 26 and 27 petitioner cites two cases in the Second Circuit which, according to petitioner, show that an operating agent acting either for the Fleet Corporation or the United States can be held liable for negligence in the commission of a maritime tort. These cases are *Blumenthal* v. *United States*, 30 Fed. (2d) 247, (2) (Second Circuit) and *N. Y. & Cuba Mail* v. *United States*, 12 Fed. (2d) 348 (Second Circuit). Just why these cases are cited it is difficult to imagine. Petitioner's counsel must have known that the *Blumenthal* case was decided in 1929 and the *N. Y. & Cuba Mail* case was decided in 1926. Both were Admiralty cases, and, so far as the suits were against the United States, were pursuant to the Suits in Admiralty Act. However, both cases were decided before the Supreme Court had construed the Suits in Admiralty Act in the cases of *Johnson* v. *U. S. Shipping Board Emergency Fleet Corporation* and *U. S. Shipping Board Emergency Fleet Corporation, et al.* v. *Lustgarten*, 280 U. S. 320 (1930).

The cases are, therefore, irrelevant to the point involved in this petition, which is concerned with the construction of the Suits in Admiralty Act as set forth particularly in the *Lustgarten* case and the application of that construction to the facts in the case at bar.

On page 9 of the petition, petitioner's counsel refers to the case of *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190, certiorari denied, 62 S. Ct. 185. Petitioner's counsel notes that petitioner relied on that case below. On page 11 of the petition, petitioner's counsel notes that Judge Clark, in his dissenting opinion "did not see any distinction between the *Quinn* case, in which a bridge tender was killed on the bridge, a non-maritime tort, and the Brady's ship's ladder case, a maritime tort. Moreover, on page 12 of the petition, petitioner's counsel says that he does not see any difference. To quote him:

> "The circumstance that Quinn suffered a land tort and Brady suffered a maritime tort is too artificial and unsubstantial to form the basis for a determination that Quinn may sue at law but Brady cannot."

We suppose it is somewhat irrelevant to quote against counsel what he has said in other cases. However, for what it may be worth, we point out that Mr. Gazan, who wrote the petition and brief herein, wrote the brief in opposition to the petition for certiorari in the *Quinn* case, and there, on page 9, said:

> "Since this was not a maritime tort, the Suits in Admiralty Act had no application. Quinn and Oakes were shore workers, not members of the crew. Theirs was a common law cause of action under the state law of Delaware, the *locus delicti*."

Furthermore, petitioner's counsel has shown by his actions over the years an understanding of the law which seems to differ from what is set forth in the petition and brief.

In the following cases he brought suit against the United States of America notwithstanding that the vessel was operated for the United States by a private operator. It is not to be believed that he would have sacrificed a jury if he had not thought he was obliged to do so:

Kunschman v. *United States, et al.*, 54 F. (2d) 987 (1982); see page 3 of the case record, where the libel alleges operation by Roosevelt Steamship Company, Inc.; *Johnson* v. *United States*, 74 F. (2d) 703 (1935); see page 704, where the court says that the vessel was "operated by Roosevelt Steamship Company for account of the Emergency Fleet Corporation"; *Miller* v. *United States*, 1940 AMC 475, Southern District New York, February 7, 1940; *Hubbard* v. *United States*, 1940 AMC 1074, Southern District New York, May 27, 1940; *Reid* v. *United States*, 1941 AMC 816, Southern District New York, March 28, 1941. (In the last three cases the operating agent was Moore & McCormack. In the report of the Reid case it is stated that Moore & McCormack were managing agents. This was five years after the passage of the Merchant Marine Act of 1936.)

D. Conclusion.

The petition should be denied. Congressional policy has confined petitioner to a choice between two substantial remedies: United States Compensation or United States litigation. Petitioner merely seeks to enlarge the field of her choice of remedies. She wishes to pursue the remedy

of private litigation and she seeks this after she has already exercised the compensation remedy. There is no need of, and the petition herein does not give any good reason for, permitting this and thereby changing the well-established and well-understood construction of the Suits in Admiralty Act set forth in the *Eastgarten* case. Indeed, to do so would be to upset the basis on which important legislation is now being predicated.

Respectfully submitted,

RAYMOND PARMER and
VERNON SIMS JONES,
Attorneys for Respondent.

APPENDIX.

There is set forth below significant portions of the operating contracts involved in the present case and in the case of *U. S. Shipping Board Emergency Fleet Corporation et al.* v. *Lustgarten*, 280 U. S. 320. They are grouped for easy comparison of similar provisions of each contract.

1. *Roosevelt Contract.* R. 28, 30.

"This Agreement made on the 28th day of June, 1937, between the United States Maritime Commission, hereinafter sometimes designated as the Owner, and Roosevelt Steamship Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereinafter designated as the Managing Agent.

Whereas, the Commission is the Owner of the following vessels (herein sometimes referred to as the Owner's vessels) presently managed and operated for its account by the Managing Agent in a Line known as the American Pioneer Line (herein sometimes referred to as the Line): R. 28.

* * * * * *

Whereas, * * * the Owner has determined that, in order to carry on the activities authorized by the Act, it is necessary for the Owner to enter into this agreement for the operation of the Line for its account by the Managing Agent for the period and subject to the terms and conditions hereinafter set forth; and

Whereas, the Managing Agent has indicated its willingness to undertake the management and operation of the Line for said period and subject to said terms and conditions;" R. 30.

Consolidated Contract. Lustgarten Record 329.

"This Agreement made in duplicate the 1st day of May 1924, between the United States of America,

hereinafter designated as The Owner, acting through the United States Shipping Board, represented by the United States Shipping Board Emergency Fleet Corporation, and Consolidated Navigation Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, hereinafter called The Agent, witnesseth:"

2. *Roosevelt Contract.* R. 30.

"The Owner hereby designates the Managing Agent as its Managing Agent to manage, operate and conduct the business of the Line for the period, in the manner, and subject to the terms and conditions herein set forth, for and on behalf of the Owner and under its supervision and direction. The Managing Agent hereby accepts said appointment."

Consolidated Contract. Lustgarten Record. 329.

"The Owner appoints The Agent as its agent to manage, operate, and conduct the business of such vessel as it has assigned or may assign to The Agent under the supervision of The Owner at all times."

"The Agent agrees to act as such agent and to manage, operate and conduct the business of such vessels in accordance with the directions, orders, and regulations which The Owner may from time to time prescribe."

3. *Roosevelt Contract.* R. 33, 39.

"The managing agent agrees to man, equip, victual, supply and operate the vessels subject to such restrictions and in such manner as the owner may prescribe, and to certify or approve for payment by the owner the true course thereof and all other costs and expenses except overhead incident to the management, operation and conduct of business of the vessels as the owner may from time to time direct." R. 33.

"The owner agrees to pay to the managing agent the actual overhead expenses of the managing agent determined by the owner to have been fairly and reasonably incurred, and to be properly applicable to the management and operation of the Commission's vessels under this agreement." R. 39.

Consolidated Contract. Lustgarten Record, 330.

"The Agent agrees to man, equip, victual and supply such vessels, subject to such restrictions and in such manner as The Owner may prescribe, and to pay for account of The Owner the cost thereof and all other costs and expenses incident to the management, operation and conduct of business of such vessel as The Agent may from time to time be directed by The Owner."

4. *Roosevelt Contract.* R. 32.

"The Managing Agent shall manage and operate the said vessels exclusively under the trade name American Pioneer Line. Such trade name shall remain the property of the Owner and the Managing Agent shall have no further right to the use of said trade name upon termination of this agreement as herein provided."

Consolidated Contract. Lustgarten Record, 336.

"The trade name under which a line or route is operated with vessels of The Owner shall be subject to the approval of The Owner, and shall not contain the name of The Agent, and such trade name shall remain the property of The Owner."

5. *Roosevelt Contract.* R. 34.

"The Managing Agent agrees to conduct its operations with respect to the vessels . . . in full compliance with applicable provisions of law, and par-

ticularly the Act, and in the most economical and efficient manner, but with due regard to the wage and manning scales and working conditions prescribed by the Owner. The Managing Agent shall exercise due diligence to protect and safeguard the interests of the Owner in all respects, and to avoid loss and damage of every nature to the Owner."

Consolidated Contract. Lustgarten Record, 330.

"The Agent agrees to exercise reasonable care to protect and safeguard the interests of The Owner in all respects, and to exercise reasonable care to avoid loss and damage of every nature to The Owner."

6. *Roosevelt Contract.* R. 36.

"The Managing Agent shall, subject to such regulations or methods of supervision and inspection as may be required or prescribed by the Owner, exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment and spare parts and will effect maintenance and voyage repairs and replacements."

Consolidated Contract. Lustgarten Record, 330.

"The Agent shall, subject to such regulation or methods of supervision and inspection as may be required by The Owner, exercise reasonable care to maintain the vessel in a thoroughly efficient state in hull, machinery, tackle, apparel, furniture and equipment."

7. *Roosevelt Contract.* R. 38.

The Managing Agent agrees to provide a bond in the sum of $80,000, "to be conditioned upon the due and faithful performance of all and singular the

covenants and agreements of the Managing Agent contained in this agreement, * * *"

Consolidated Contract. Lustgarten Record, 336.

"The Agent agrees, whenever required by The Owner, to furnish a bond satisfactory to The Owner for the faithful performance of The Agent's duties and obligations hereunder."

8. *Roosevelt Contract.* R. 41.

"Any agents selected or appointed by the Managing Agent shall be solely the agents of said Managing Agent and not, in any respect, the agents of the Owner."

Consolidated Contract. Lustgarten Record, 331.

"The selection by The Agent or agents or subagents shall be subject to disapproval by The Owner. The Agent shall be responsible to The Owner in all respects for the acts of any subagent selected by him, and such subagents shall not be in any respect the agents of The Owner but solely the agents of the said Agent."

9. *Roosevelt Contract.* R. 42.

"The Owner may terminate this agreement * * * in case of the occurrence of any of the following events of default:

(a) A voluntary sale by the Managing Agent of this agreement, or any interest therein, or an assignment, * * * whereby the management or operation of the above described Line or vessels shall be divested from the Managing Agent, unless the prior written consent of the Owner is obtained."

Consolidated Contract. Lustgarten Record, 336.

"The Owner shall have the right at any time to terminate this agreement as to any and all vessels

assigned to The Agent, and to assume control forthwith of any or all of said vessels, and to collect directly all freight moneys or other debts remaining unpaid."

10. *Roosevelt Contract.* R. 33.

"All business shall be carried on in the name of the Line for the account of the Owner. The Managing Agent shall, as directed by the Owner, collect all moneys and shall certify or approve for payment by the Owner, vouchers covering all expenses incident to the management and operation of the Line, the maintenance and operation of the vessels, and all other business activities pertaining thereto. The Managing Agent shall account to the Owner for all moneys collected by it or its subagents or moneys disbursed by its subagents."

Consolidated Contract. Lustgarten Record, 331, 332.

"The Agent agrees to collect when due all freight and other moneys accruing to The Owner arising out of the management, operation and business of the vessels," (331).

"The Agent agrees to deposit all moneys collected on behalf of The Owner in a national bank or bank which is a member of the United States Federal Reserve Association or such other bank as may be approved by The Owner as a separate fund in the name of the United States Shipping Board Emergency Fleet Corporation, which money shall, in so far as The Agent is concerned, be the property of The Owner, and drawn upon only as directed by The Owner." (331).

"The Owner shall pay to The Agent as full compensation for The Agent's services the commissions and fees specified hereunder as follows" (332):

(There follows a schedule of fees with respect to cargo, passenger revenue, etc.)

11. *Roosevelt Contract.* R. 37.

"The Owner shall provide, without cost or expense to the Managing Agent, hull machinery, and port risk insurance, and the Managing Agent shall provide, for the account of the Owner and subject to its approval, Protection and Indemnity, and such other forms of insurance as the Owner may deem necessary.".

Consolidated Contract. Lustgarten Record, 330.

There is no specific reference to insurance. The matter is dealt with generally as follows:

"The Agent agrees to exercise reasonable care to protect and safeguard the interests of The Owner in all respects, and to exercise reasonable care to avoid loss and damage of every nature to The Owner."

FILE COPY

DEC 12 1942

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 269.

MARGARET M. BRADY, as Administratrix of James P. Brady, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR ROOSEVELT STEAMSHIP COMPANY, INC., RESPONDENT.

VERNON SIMS JONES,
RAYMOND PARMER,
New York City,
Attorneys for Respondent.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR ROOSEVELT STEAMSHIP COMPANY, INC., RESPONDENT.

Certiorari was granted on October 12, 1942, to review a decision of the Circuit Court of Appeals for the Second Circuit, which reversed, with one dissent, a judgment of the District Court for the Southern District of New York, after a trial by jury, and which dismissed the complaint. The opinion of the Circuit Court of Appeals (R. 115) is reported at 128 F. (2d.) 169. The District Court wrote an opinion in connection with a motion which was made before trial. R. 39. It is unreported. An opinion was not written by the District Court at the trial. However, the District Court expressed an opinion during a colloquy between court and counsel. R. 97.

STATEMENT.

This case arises out of an accident which occurred on July 9, 1938, when the steamship *Unicoi*, owned by the United States, had just arrived at Pier 58, North River,

New York. Shortly thereafter, a ladder which was approximately thirty or forty feet long, was put down from the vessel to the dock. Thereupon, James P. Brady, who was employed by the United States as a customs inspector, and who had duties on board the vessel, climbed this ladder, and, while he was doing so, one of the rungs broke, causing him to fall to the rung below. As a result of this, Mr. Brady became ill with appendicitis, for which there was an operation. Following the operation, and on July 20, 1938, he died.

Because Mr. Brady was an employee of the United States at the time of his death, his widow and minor children were entitled to obtain compensation from the United States under the provisions of the United States Employees' Compensation Act, 5 U. S. C. §751 *et seq.* Before the expiration of the two years permitted for bringing actions for damages on account of negligence against the United States, under the provisions of the Suits in Admiralty Act (46 U. S. C. 745), Mr. Brady's widow chose to exercise the remedy given by the United States under the Compensation Act, received payments thereunder, and, presumably, is still receiving them. Under the law she was, and is, entitled to such payments for the rest of her life, or until remarriage. 5 U. S. C. §760 (a).

In petitioner's brief in the Circuit Court of Appeals it was stated that a daughter, aged 15 at the time of the death, had received compensation for three years, and that the other child, a son, aged 20 at the time of the death, was not eligible for compensation. Appellee's Brief, C. C. A., p. 19.

By accepting compensation, Mrs. Brady and the daughter relinquished their right to sue the United States. *Dohs* v. *Davis*, 258 U. S. 421.

In addition to exercising the remedy under the United States Employees' Compensation Act, the widow, as Administratrix of her husband's estate, brought the present action

against Roosevelt Steamship Company, Inc., to recover damages, on the ground that her husband's death had been caused by negligence for which it was responsible.

Roosevelt Steamship Company, Inc. is a private corporation, and had entered into a contract with the United States of America, acting through the U. S. Maritime Commission, by which it agreed, as managing agent, to manage, operate and conduct the business of a steamship line which belonged to the United States "for and on behalf of the owner, and under its supervision and direction." This steamship line was known as "American Pioneer Line", a trade name, which also belonged to the United States. R. 24.

The contract is set forth in full at pages 21 to 32 of the record. In the preamble it was noted that Roosevelt Steamship Company, Inc. was already operating the line under a contract which was about to be terminated (R. 21-22), that the Maritime Commission had not been able to charter the vessels on favorable terms pursuant to the Merchant Marine Act of 1936, and that the Maritime Commission had determined, pursuant to Section 707 (c) of that act (46 U. S. C. 1194), to operate the line, itself, temporarily.

Section 707 (c) of the Merchant Marine Act of 1936 provided that, in circumstances such as those referred to in the preamble, and until such time, and upon such operating agreements as the Commission might deem advantageous, the vessels referred to therein "shall be temporarily operated *by the Commission* for its account by private operators."

Therefore, both the statute and the contract which depended on it proceeded upon the assumption that the operation of the vessels was by the United States, and that the "private operator" referred to in the statute was the

instrument of the United States "by" which this Congressional intent as to operation was to be accomplished. As used in the statute, the phrase "private operator" meant merely "non-governmental operator." It did not mean "operator with a private interest", as the petitioner would imply. The enterprise contemplated by the statute was not private enterprise. It was government enterprise, lock, stock and barrel. The agent was not to work for itself. It was to serve the United States as a means by which the United States might make money in the shipping business while the United States remained in it temporarily because it could not get out of it.

Pursuant to the statute and as a fulfilment of the Congressional intent as above set forth, the contract provided that the capital to be employed, the expenses to be incurred, the profits to be gained, and the losses to be borne, belonged to the United States. R. 21, 24, 25, 29, 30. Roosevelt Steamship Company, Inc. was entitled only to be reimbursed for its expenses. For its services it was paid nothing. R. 25, 29, 30. The United States retained full supervisory powers over the conduct of the agent. R. 22, 25, 26, 27. It was provided that "All business shall be carried on in the name of the Line for the account of the Owner." R. 24. This meant that all business was to be carried on in the name of the United States, doing business under the name of "American Pioneer Line", a trade name owned by the United States, which, incidentally, was guarded jealously by its owner. R. 24.

In view of the foregoing, therefore, Roosevelt Steamship Company, Inc. could not be, and was not, either a bare boat charterer, an owner *pro hac vice*, or an independent operator or contractor. It was a managing agent of the United States, and described as such.

The plaintiff claimed that the ladder which broke and caused the accident belonged to the defendant. R. 2. There was no proof of this. On the contrary, the contract between the United States and Roosevelt Steamship Company, Inc. showed that the vessel, and equipment, belonged to the United States. R. 21, 26.

Plaintiff claimed further that the ladder was furnished and supplied for the use of deceased by the defendant, its agents, servants and employees. R. 2. The only proof of this was that the ladder was put down from the vessel to the dock by persons on the vessel while the ship was being made fast to the dock and before the gangway was put down. R. 62. It was inferable, therefore, that certain unidentified members of the crew had furnished the ladder. Furthermore, only two items of evidence were offered in an attempt to prove that these unidentified members of the crew were the servants of the defendant. Neither item proved it. Each item proved the contrary. The first item was the written contract between the United States of America and Roosevelt Steamship Company, Inc., already referred to. R. 54, 21-32. The second item was the testimony of Andrew Finch, Vice President of the defendant. He testified that Roosevelt Steamship Company, Inc. operated the vessel under the above-mentioned contract, that Roosevelt Steamship Company, Inc. did *not* hire any of the members of the crew, that its only connection with the crew was to recommend to the Maritime Commission the hiring of the licensed officers, that the other members of the crew were hired by the Maritime Commission without any recommendation or participation on the part of Roosevelt Steamship Company, Inc. R. 53, 54, 55, 18, 19. Rules of Civil Procedure, 26, d, 4.

Proof of negligence consisted of an inference to be drawn from the fact that the rung of the ladder broke, and from

the testimony of a witness who described the condition of the broken piece which remained on the ladder. He said it looked rotten. R. 64.

Thus, the case against the defendant was purely one of an alleged liability for the negligence of the crew of the Government's vessel. Apart from this there was no fault alleged or proved against the defendant. And this was not the personal fault of the defendant.

Respondeat superior has been referred to accurately as a type of liability without fault. (1932) 81 Pa. Law. Rev. 130 at 142. That is the liability which the plaintiff endeavored to impose on the defendant. It depended on who employed the crew, which alone was at fault.

At the close of the plaintiff's case defendant moved to dismiss the complaint on the ground that there had not been any proof of negligence on the part of the defendant, "or on the part of any person for whom this defendant would be legally responsible." The motion was denied, and an exception taken. R. 83. The motion was renewed at the end of the entire case, together with a motion for a directed verdict, and the same ruling was made and exception taken. R. 103. The District Court ruled that it was bound by the ruling of the Circuit Court of Appeals in the case of *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190 (1941), which had held that a mere managing agent is the employer of the crew of a United States owned merchant vessel. R. 97.

In addition to these motions, which related to the merits, the defendant moved to dismiss, both before the trial and during the trial, on the ground that the court did not have jurisdiction of the subject-matter, by reason of the decision of this court in *Johnson* v. *United States Shipping Board Emergency Fleet Corporation* and *United States Shipping Board Emergency Fleet Corporation* v. *Lustgarten*, 280 U. S. 320 (1930). R. 11, 90, 91.

Defendant contended that, as construed by that case, the Suits in Admiralty Act, 46 U. S. C. 741, *et seq.*, provided the exclusive remedy which the plaintiff had for the tort, if any, which had been committed, and that that act excluded suits brought elsewhere than in Admiralty, not only against the United States, and against wholly government-owned corporations, but also against private corporations which were, like the defendant in the case at bar, acting as managing agents of the United States. R. 91, 12.

The motion which was made before trial was made on affidavits, one of which was the affidavit of the District Counsel of the United States Maritime Commission and Special Assistant to the United States Attorney for the Southern District of New York. This affidavit asserted the financial interest of the United States in the case, and on behalf of the United States asked that the action be dismissed for lack of jurisdiction. R. 13, 14, 15. The motion was denied, with an opinion. R. 39, 40. The opinion was based on a misapprehension of the question which was before the court. R. 40; 128 F. (2d) 169, at 170. The court thought, mistakenly, that the question which was before it was controlled by the District Court decision in *Quinn* v. *Southgate Nelson Corporation*, 36 F. Supp. 873 (1941). But in that case the only question involved was whether the managing agent employed the crew. The jurisdiction of the court as affected by the Suits in Admiralty Act was not involved.

On the trial the motion to dismiss for lack of jurisdiction was renewed. On this occasion the motion was made on the basis of the operating contract and the testimony of Mr. Finch, *supra*, which had been introduced by the plaintiff, and also on the basis of additional testimony introduced by the defendant and received by the court in the absence of the jury. R. 83. This was the testimony of Mr. Collins,

who, again representing the interests of the United States, objected to the maintenance of the action, and pointed out that, if any judgment were obtained against the defendant, and paid by it, the United States would have to reimburse the defendant. R. 84, 85.

At this point in the trial, defendant also attempted to prove that in actual practice the Maritime Commission treated disbursements made by an agent in payment of tort judgments as "expenses incidental to the management and operation of the line," which were payable under the contract by the United States. R. 86, 87, 88, 98, 99. Temporary Operating Agreement, Clauses 6, 7, 19, R. 24, 25, 29, R. 24. Evidence on this subject was relevant because the plaintiff contended that "operating expenses" did not include such disbursements. R. 87. Since the contract itself contained nothing specific in this regard, and since there was controversy and consequent uncertainty as to the meaning of the general words, the actual practice (usage) of the parties was relevant to show what the parties meant in using those words. For this purpose defendant called Mr. Wilbur F. Carley, certifying officer of the Maritime Commission, whose duty it was to certify to the Treasury Department for payment the expenses incurred in connection with the operation of the vessels. R. 86. He was not permitted to testify. R. 88.

The Trial Court's reason for excluding this evidence is somewhat obscure. At one point the court said, R. 87:

> "I haven't read through the agreement itself, but a recovery in such an action as this would be included among the disbursement payments which would be submitted by Roosevelt Steamship Company to the Maritime Commission."

The Decisions Below.

Reference has been made already to the decision of the District Court which denied the motion made before trial with regard to jurisdiction. It has been pointed out that this resulted from a misapplication of the Quinn case, (District Court Opinion, 36 F. Supp. 873), which had nothing to do with jurisdiction.

Reference has also been made to the decision of the District Court which denied the motion made at the trial to dismiss the complaint on the merits because Roosevelt Steamship Company, Inc. was not the employer of the members of the crew who committed the negligent tort. In denying this motion the District Court applied the actual decision in the *Quinn* case, 121 F. (2d) 190 (C. C. A.). There is no doubt that the Circuit Court had ruled that a managing agent was the employer of the crew.

The District Court at the trial also denied the motion made to dismiss the complaint on the ground of lack of jurisdiction of the subject matter. R. 98. Here, again, the court misapprehended the question which was before it for decision. R. 97, 128 F. (2d) 169, at 170. The District Court thought that the *Quinn* case controlled. Of course it did not. The question which was before the court on this motion was not, as the District Court thought, whether the defendant employed the crew, but whether, if it did employ them, the United States only was suable for a tort of which the crew had been guilty.

The District Court did not require the jury to pass specifically on the question as to whether defendant employed the crew. Following the *Quinn* case, the court assumed that the defendant employed them and left to the jury simply the question whether the deceased was injured as a

result of the negligence of the defendant, *i.e.*, negligence for which the defendant was responsible. Charge, R. 104-109.

Accordingly, the jury brought in a verdict in the sum of $19,000. R. 111. To this, the clerk added interest from *the date of the death* at the rate of 6%, bringing the total to a judgment of $22,760. R. 112. Incidentally, it should be noted that had the United States been sued directly, pursuant to the provisions of the Suits in Admiralty Act, interest on a decree against the United States would have been at the rate of 4% *from the time of the decree* until satisfaction. 46 U. S. C. Section 743.

The Circuit Court of Appeals reversed the judgment. In line with its previous decision in *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190, cert. denied, 314 U. S. 682, it assumed that the defendant employed the crew on its own behalf as an agent for the United States. 128 F. (2d) 169, 170. However, it held that, since a maritime tort was involved in this case, the Suits in Admiralty Act provided the exclusive remedy for prosecuting such actions as the plaintiff's, namely, one based on a claim for damages for an alleged maritime tort committed by servants of an agent (so the court held) of the United States in the operation of a United States-owned vessel. In so holding, it relied solely on the decision of this court in *United States Shipping Board Emergency Fleet Corporation* v. *Lustgarten*, 280 U. S. 320 (1930).

Statutes Involved.

Suits in Admiralty Act, 46 U. S. C., §§741, 742 provide as follows:

> "§741. *Exemption of United States vessels and cargoes from arrest or seizure.* No vessel owned by the United States or by any corporation in which

the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States, or of such corporation or operated by or for the United States, or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this chapter shall not apply to the Panama Railroad Company."

"§742. *Libel in personam.* In cases where, if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem, or in personam, in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application

of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States."

The Questions Presented.

Two questions are presented. The first is whether, assuming that Roosevelt Steamship Company, Inc., acting as agent for the United States, employed *on its own behalf* the members of the crew who committed the tort, the Suits in Admiralty Act permits and, therefore, requires suit to be brought against the United States in Admiralty, and forbids suit being maintained against the agent. The second question is whether the members of the crew who committed the tort were employed by and *on behalf of* Roosevelt Steamship Company, Inc. or by and *on behalf of* the United States.

The first question is the one which the petitioner asked this court to review.

The second question is involved also, for, if the agent did not employ the members of the crew on his own behalf, it could not be liable for the tort in any event, and the defendant's motion to dismiss on the merits should have been granted. The District Court denied defendant's motion to dismiss on this ground because it considered itself bound by the decision of the Circuit Court of Appeals in *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190. R. 97, 83, 103. The Circuit Court of Appeals also followed that decision. 128 F. (2d) 169, 170.

If, however, that decision is wrong, and, accordingly, the agent did not employ the members of the crew who committeed the tort, the judgment of the Circuit Court which dismissed the complaint is correct, although for a further and different reason from the one given by the Circuit Court of Appeals.

Defendant below raised and preserved the point properly and is entitled to have it passed on in this court. R. 83, 103.

Le Tulle v. *Scofield*, 308 U. S. 415, 421 (1939);
Ryerson v. *United States*, 312 U. S. 405, 408 (1940);
Bondholders Committee, etc. v. *Commissioner of Internal Revenue*, 315 U. S. 189, 192, note 2 (1942).

ARGUMENT.

POINT I.

THE SUITS IN ADMIRALTY ACT PROVIDES AN EXCLUSIVE REMEDY FOR THE CAUSE OF ACTION ASSERTED BY THE PLAINTIFF AGAINST THE DEFENDANT.

The Circuit Court reversed the judgment below because of the controlling decision of this court in *United States Shipping Board Emergency Fleet Corporation* v. *Lustgarten*, 280 U. S. 320 (1930).

It is not contended that the *Lustgarten* case was wrongly decided. Petitioner says it was correct. Petitioner's Brief, pp. 17, 18. So do we.

The question before the court, then, is what that case decides, and whether it applies here.

A. THE HOLDING IN THE LUSTGARTEN CASE.

In the *Lustgarten* case a judgment in the sum of over $10,000 had been obtained against the United States Shipping Board Emergency Fleet Corporation and against Consolidated Navigation Company, Inc., a private corporation, which was exactly like the defendant in this case, and which was acting in the same manner as managing agent for the United States, on account of a tort suffered

by a seaman through the negligence of the master and officers of a Government owned merchant vessel who refused to give him medical treatment for an injury. 280 U. S. 320, at 323. This judgment, which was rendered on the theory that Consolidated Navigation Company employed the master and officers on its own behalf and was therefore responsible for their acts, was reversed by this court, on the ground that, if the foregoing was true, the Suits in Admiralty Act provided a remedy in Admiralty *in personam* against the United States of America which was an exclusive substitute for all other remedies. The Fleet Corporation and Consolidated Navigation Company had contended *inter alia* before this court, that they did not employ the crew, and that the United States did, and that the judgment against them was invalid for that reason. Petitioner's Brief in the *Lustgarten* case, pp. 22, 23. This court did not pass on the question of responsibility of the agent for the torts of the crew. It assumed for the purposes of its decision that *both* defendants employed the crew. If it had not done so, the question of jurisdiction would not have been before the court for decision.

The nub of the decision is contained in one sentence:

> "We conclude that the remedies given by the Act are exclusive in all cases where a libel might be filed under it." 280 U. S. 320, at p. 327.

This exclusiveness was not primarily a limitation respecting the suability of certain possible defendants but rather a limitation respecting the courts where litigation involving a particular subject matter might be brought. Solely as an incident of such a limitation the United States and its wholly owned corporations were the only entities which were suable in Admiralty. In result, other agents of the United States were not suable at all. They were

not suable elsewhere than in Admiralty because other courts did not have jurisdiction of the subject matter. They were not suable in Admiralty because the Suits in Admiralty Act did not describe them as permissible respondents. The United States and its wholly owned corporations were so described. No one, therefore, could complain that, if he had a good case, he was prejudiced because the defendant was irresponsible or because the real party in interest was not before the court.

Thus, this court said, at page 327:

> "Putting the United States and the Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation *or other agents* for enforcement of the maritime causes of action covered by the Act. Such a failure of purpose on the part of the Congress is not readily to be inferred." (Italics ours.)

Accordingly, the judgment which was against both the United States Shipping Board Emergency Fleet Corporation and against Consolidated Navigation Corporation, the private operating agent, was reversed, with directions to dismiss the complaint against both. 280 U. S. 320, 327. Therefore, Consolidated Navigation Corporation, against whom there was a judgment for over $10,000, on the theory that it was liable as the employer of the captain who committed the negligent act, was held not to be suable elsewhere than in Admiralty, and therefore not suable at all.

In the light of the above-quoted passage from the court's opinion, there can be no doubt that this court decided, and intended to decide, that the private operating

agent in the *Lustgarten* case could not be sued at all. That passage was not a mere "dictum" (cf. petitioner's brief, p. 2). It was not an inadvertence (cf. petitioner's brief, p. 24) and it was not a "slip" (cf. petitioner's brief, p. 3). It was language wholly appropriate and necessary to explain what the court actually did. The court reversed a judgment for over $10,000 against the private operating agent.

The *Lustgarten* case is not an isolated case, although most of the petitioner's difficulty is caused by treating it as if it were. Instead, it is the logical result of cases which preceded it and which also construed the Suits in Admiralty Act. Those cases must be read with it in order to understand the construction intended by the court.

The first of those cases is *Eastern Transportation Company* v. *United States*, 272 U. S. 675 (1927). The holding in that case is expressed succinctly by the following excerpt from the opinion in the case of *United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Brothers & Company*, 276 U. S. 202, at 212 (1928):

> "• • • while the main purpose of the Act was to exempt from seizure and arrest merchant vessels of the United States operated by it and its subordinate shipping corporations, and to substitute for a suit *in rem* one *in personam* attended with the incidents of a proceeding *in rem* in which the personal liability of the United States toook the place of the vessel, *the act also had a wider effect and created a broader personal obligation of the United States as the owner of an offending vessel, like that of a private owner*, which might be enforced in admiralty by a libel *in personam* in cases where there was no basis for an action *in rem*." (Italics ours.)

The second case is the *Rosenberg* case, just cited. This case held that the two types of libel *in personam* referred

to above, one of which was a substitute for a libel *in rem* and the other a means of enforcing the newly created personal obligation of the United States, were the exclusive remedies which could be exercised *in Admiralty* against the United States and its wholly owned corporations for all maritime claims arising out of the possession or operation of merchant vessels of the United States and such corporations. This court said, with reference to the Suits in Admiralty Act, at page 213:

> "It provides a remedy in admiralty for adjudicating and satisfying all maritime claims arising out of the possession or operation of merchant vessels of the United States and the corporations, in which the obligation of the United States is substituted for that of the corporations. To that end it furnishes a complete system of administration, applying to the United States and the corporations alike, by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation; and not only provides that the judgments against the corporations, as well as those against the United States, shall be paid out of money in the Treasury, but repeals the inconsistent provisions of all other Acts.
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> In view of these provisions of the Act we cannot doubt that it *was intended to furnish the exclusive remedy in admiralty against the United States and the corporations on all maritime causes of action arising out of the possession or operation of merchant vessels.* And nothing in its legislative history indicates a different purpose." (Italics ours)

The *Lustgarten* case took the ultimate step which had been foreshadowed by the preceding cases. It held that the two types of libel *in personam* referred to in *Eastern Transportation Company* v. *United States*, 272 U. S. 675, are the

exclusive remedies in all courts "on all maritime causes of action" arising "out of the possession or operation of merchant vessels by or for the United States." 46 U. S. C. § 741, 280 U. S. at 326. It is merely incidental to that restriction of remedy that the available admiralty remedies are operable only against the United States or its wholly owned corporations.

Therefore, it was in the light of the foregoing that this court used the words which we re-quote:

> "We conclude that the remedies given by the Act are exclusive in all cases where a libel might be filed under it." 280 U. S. 320, at page 327.

As construed by this court, therefore, the Suits in Admiralty Act expressed a public policy on the part of Congress to require that claims on account of maritime torts involving government-owned vessels be decided in Admiralty only, where the United States could present directly any defenses it might have to its direct or ultimate liability. As a necessary part of this public policy, suits could not be permitted against its agents in other courts, where the United States would not have control of the litigation, and, thus, would not be in a position to offer the best available defenses. Thus, the immunity from suit conferred upon the agent was not done by way of conferring on him a privilege. The real purpose was the protection of the United States, and it was incidental to this protection that the agent was immune from suit. If the agent was personally at fault, it was for the United States only to decide what measures might be taken against him.

B. The Application of the Lustgarten Case to This Case.

The cause of action on which Mrs. Brady sued was given by the New York Death Act, Decedent Estate Law, Article 5, § 130; Death on the High Seas Act, 46 U. S. C., §§ 761, 767. If the *S.S. Unicoi* had been privately owned or operated, a proceeding in Admiralty could have been maintained to enforce it. The cause of action was maritime. *The Admiral Peoples*, 295 U. S. 649 (1934); *Western Fuel Company* v. *Garcia*, 257 U. S. 233 (1921). Cf. 46 U. S. C. § 742.

The *S.S. Unicoi* was owned by the United States, and was "operated • • • for the United States" by the defendant. The contract said so. There was no evidence to the contrary. Temporary Operating Agreement. R. 22. Cf. 46 U. S. C. § 741.

The cause of action on which recovery was sought arose out of the "operation of a vessel • • • for the United States." *United States Shipping Board Emergency Fleet Corporation* v. *Lustgarten*, 280 U. S. 320, at 326. The alleged negligence related to the operation of furnishing a defective ladder as a means of access to the vessel.

It follows that the exclusive remedy was to sue in Admiralty under the Suits in Admiralty Act, making the United States a party respondent, as therein provided, and that the judgment rendered below at common law against Roosevelt Steamship Company, Inc. was without legal authority because, so far as it operated the vessel at all, it did so "for the United States".

In principle, it follows from the Lustgarten decision that, if the cause of action is maritime and it arises out of the operation of a merchant vessel "by or for the United States", suit therefor must be brought pursuant to the provisions of the Suits in Admiralty Act. This is so, irre-

spective of the terminology which may be used in describing the relationship to the United States of the persons or corporations who, while acting for the United States, may be either closely or remotely connected with the tort. Thus, whether such person or corporation be a servant, i.e. agent subject to United States control (Rest., Agency, Section 220, comment on subsection (1): a); superior servant, i.e. agent subject to United States control, such as a ship captain or a general manager (Rest., Agency, Section 220, comment on subsection (1): a); agent acting independently of United States control but with fiduciary obligations to the United States, (Rest., Agency, Section 220, comment on subsection (1): c); or an independent contractor i.e. agent acting independently of United States control and without fiduciary obligations, (Rest. Agency, Section 220, comment on subsection (1): c); jurisdiction to hear the cause is confined within the limits prescribed by the Suits in Admiralty Act, provided only that the cause of action arose out of the operation of a United States owned merchant vessel "by or for the United States." If, on the other hand, the cause of action arose out of the operation of a United States owned vessel which was not being operated "by or for the United States" but rather by or for a genuine bareboat charterer, the restrictions of the Suits in Admiralty Act would not apply. Under such circumstances, the title to the vessel would be the only link connecting the United States to the operation. Such operation would not be "by or for the United States." It would be by and for the bareboat charterer, whose interest, financial and otherwise, would be the only one involved in the operation.

Roosevelt Steamship Company, Inc. was neither an independent contractor nor an agent acting independently of the control of the United States. Rest. Agency, Section

220, comment on subsection (1): c. Rightly construed, the contract shows that Roosevelt Steamship Company, Inc. was merely a corporate superior servant. It provided the managerial talent necessary to operate a steamship line in the same way and to the same extent that an individual might do it if he were hired as a general manager by the United States. Rest. Agency, Section 220, comment on subsection (1): a.

Decided cases which illustrate the legal principles applicable here and set forth in the foregoing citations from "Restatement of the Law of Agency", are as follows:

Folwell v. *Miller*, 145 Fed. 495 (1906), Second Circuit;

Wahlheimer v. *Hardenbergh*, 217 N. Y. 264 (1916) (opinion by Cardozo);

Smith v. *Rutledge*, 332 Ill. 150 (1928);

Bath v. *Caton*, 37 Mich. 199, 202 (1877);

Ellis v. *Southern Railway Co.*, 72 S. C. 465 (1905);

Johnson v. *City of Memphis*, 77 Tenn. 125 (1882);

Brown v. *Lent*, 20 Vt. 529 (1848);

Parker et ux. v. *Cone, et al.*, 104 Vt. 421 (1932);

City of Los Angeles v. *Los Angeles Pacific Navigation Co. et al.* 1927 A.M.C. 1778, 84 Cal. App. 413 (1927).

In *City of Los Angeles* v. *Los Angeles Pacific Navigation Co. et al., supra*, the court had before it for decision the precise point of the relation between a managing agent of the United States and members of crews of United States owned vessels. The defendant was a private corporation, acting as a managing agent for the United States of America under a contract known as the "MO 3

Contract", which was in all material respects the same as the contract between the United States of America and Roosevelt Steamship Company, Inc., in this case. A merchant vessel owned by the United States had been assigned to the defendant to "operate" pursuant to the terms of the contract and had come into collision with a ferry boat belonging to the plaintiff. It was claimed that the defendant was liable, on the ground that the captain of vessel, who was negligent and had caused the collision, was the employee of the defendant.

The court examined the contract, reviewed the authorities and in a well-considered opinion held that the captain was not the employee of the managing agent, and that the latter, accordingly, was not liable.

Like any individual general manager, defendant was an agent. Rest. Agency §1. Like such an individual it was subject to the principal's right to control the physical conduct of the performance of the service. Rest. Agency §2. Temporary Operating Agreement, Clauses 1, 6, 7, 8, 11, 12. R. 22, 24, 25, 26, 27. The premises. *i. e.*, the vessels on which the service was to be performed, belonged to the principal. Rest. Agency §220, (2) e. Such an individual would be a servant albeit a superior servant. Rest. Agency §220, comment on subsection (1): a. A proper regard for realism requires that the defendant, although a corporation, be held to have the same status.

"Two corporations stand toward each other in general just as two persons stand". *Fletcher, Cyclopedia Corporations*, Vol. 1, p. 23.

In *City of Los Angeles* v. *Los Angeles Pacific Navigation Co. et al., supra*, and in *Smith* v. *Rutledge, supra*, a corporation was treated as a superior servant and held not liable for the negligent acts of persons acting on behalf of the principal.

Incidentally, in *City of Los Angeles* v. *Los Angeles Pacific Navigation Company, et al., supra,* the court dismissed the contention that the managing agent was a charterer or an owner *pro hac vice* as obviously unsound. It is obviously unsound when made in this case. Petitioner's Brief, pp. 9, 14.

Indeed, it is only by carefully culling from the operating contract a few sentences, (pp. 8, 9) by presenting even these few sentences incompletely, (pp. 8, 9) and by the constant reiteration throughout the brief of such words as "charter", (p. 9), "owner *pro hac vice*", (p. 14), "independent operator" (p. 2), "independent contractor" (p. 3), "independent agent", (pp. 13, 14), "private enterprise", (p. 18), "private operator", (pp. 6, 7, 17, 19) without offering anything at all to justify the use of such contradictory and deceptive terminology in this case, that the petitioner seeks to support a flimsy argument that the agent in this case was different from the agent in the *Lustgarten* case. The petitioner is not concerned very much with showing what the difference is. But there is a difference, says petitioner, and, having said it, is done. Petitioner's brief, p. 17.

The truth is that the two agents are indistinguishable, as a comparison of the contracts involved in the two cases will show. For purposes of easy comparison, we have appended to our brief submitted in opposition to the petition for certiorari relevant provisions of both contracts.* In both cases, there was a private corporation in which the United States owned no stock, both corporations were

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* The citations there given for the provisions of the contract in the Lustgarten record are for that record as printed in the Circuit Court, and are as follows:

R. 329, 329, 330, 336, 330, 330, 336, 331, 336, 331, 332, 330.

Corresponding citations in the Supreme Court record are as follows:

R. 177, 177, 177, 181, 177, 177, 180, 178, 180, 178, 179, 177.

presumably solvent, both agreed to act as agent for the United States and under its supervision, both agreed to man, equip, victual and supply and operate the vessels, for the United States, under the trade name of the United States, to keep the vessels and their equipment in an efficient state, and to do all this with reasonable care or with due diligence, the United States paying all the bills, and for satisfactory performance both corporations agreed to furnish a bond. In both contracts, sub-agents, *i. e.*, ship's agents in outports were not to be considered agents of the United States but of its private corporate agent. In both contracts, the expenses were for the United States exclusively, but in the Consolidated contract, unlike the one involved in this case, the agent received a compensation for his services.

Obviously, the petitioner is embarrassed by the *Lustgarten* case, and particularly by the result so far as it affected Consolidated Navigation Corporation. In the petition to this court, petitioner copied the error of the dissenting judge in the Circuit Court of Appeals, and said that the *Lustgarten* case was distinguishable in that the judgment there was for maintenance and cure. Now that the petitioner has discovered that this statement was untrue, petitioner drops that contention and picks up another. Accordingly, much time has been devoted to constructing a supposed distinction on the foundation of erroneous statements with respect to the nature of the agency in the *Lustgarten* case as compared to the nature of the agency in the case at bar.

It is said that the M. O. 3 and the M. O. 4 Agreements were different from the one in the case at bar. Petitioner's Brief, 17. However, the difference is not pointed out. Comparison will show that there is no material difference. It is said that the old relationship between the Shipping Board

(petitioner does not say United States) and its sub-agents has ended. Petitioner's Brief, 23. Nothing is cited which supports the meaning intended. The petitioner ignores the fact that the Merchant Marine Act, notwithstanding it was the intention of Congress to put the Government out of the shipping business eventually, provided expressly that, until the United States could retire gracefully, the United States should stay in it. 46 U. S. C. 1194; Merchant Marine Act of 1936, Section 707 (c).

In the light of this circumstance, it is therefore idle for the petitioner to dwell on the governmental function performed by the Consolidated Navigation Company as if to imply that Roosevelt Steamship Company, Inc. did not perform the same governmental function. Roosevelt Steamship Company, Inc., as the statute and as the contract show, was performing a governmental function, and doing nothing else. Furthermore, nothing is gained by referring to Consolidated Navigation Company by such minimizing terms as "sub-agent" or "mere sub-agent", as if, by the mere choice of words, one could create facts. Petitioner's Brief, 16, 18, 19. The fact is that in the *Lustgarten* case Consolidated Navigation Corporation was held liable for a tort committed by the master of a government vessel and that this court held that, if it was the kind of an agent which could be held liable for such a tort, the remedies of the Suits in Admiralty Act were exclusive. Indeed, it may be said that this court could not have rendered the decision in the *Lustgarten* case unless it first assumed that Consolidated Navigation Corporation was such an agent as to make it the employer of the crew. Consequently, if it is true that Roosevelt Steamship Company, Inc. was the employer of the crew, the rule announced in the *Lustgarten* case for Consolidated Navigation Corporation is applicable to it.

Even the Circuit Court of Appeals in the Second Circuit has recognized that it is "indeed a serious matter to hold responsible for the navigation of a vessel the agent who procured the navigators." *New York & Cuba Mail S.S. Co.* v. *United States* (opinion by Judge Hough), 12 F. (2d) 348 (1926); cert. denied 273 U. S. 719.

The Chief Justice of this court, while Attorney General, expressed the opinion that such agents are not the employers of the crews but that the United States is. 34 Opinions of the Attorney General 363.

In Point II hereof, we shall deal further with the case of *Quinn* v. *Southgate Nelson Corporation* (opinion by Judge Frank), 121 F. (2d) 190 (1941), which seems to state a different rule, and which, basically, is responsible for the confusion which it is hoped will be removed by a decision by this court.

C. The Agent's Right to Indemnity and the Supposed Necessity for Showing it Independently.

It has been asserted that the *Lustgarten* case holds that the Suits in Admiralty Act is exclusive only when, in addition to its appearing that the operation was "by or for the United States", it appears also that the United States would be legally obligated to provide the money with which to reimburse the person or corporation acting for it for sums which the latter might have to pay in satisfaction of judgments obtained elsewhere than in an action brought under the Act. *Shea* v. *United States Shipping Board Emergency Fleet Corporation & Export Steamship Corporation*, 253 N. Y. 17 (1930); 56 Harv. L. Rev. 304. This thought proceeds from some incidental words which appear in the opinion in the *Lustgarten* case, 280 U. S. 320 at 326, and which are as follows:

"On the facts above stated, it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions. §8, Suits in Admiralty Act; 46 U. S. C., §748. Cf. Minnesota *v.* Hitchcock, 185 U. S. 373, 387."

In substance, it is contended that because the financial interest of the United States was mentioned in the opinion that interest is a jurisdictional fact which must be demonstrated in each case or else the jurisdiction of Admiralty is not exclusive.

It is obvious that the court did not say this. It is probable that it did not intend that meaning. The statute itself prescribed the jurisdictional facts which should determine where it should be applied, namely, that the operation of a government-owned merchant vessel was "by or for the United States." The financial interest of the United States followed as a necessary conclusion from such operation.

1. *The financial interest of the United States was demonstrated unmistakably.*

Whatever the court may have intended, it cannot affect this case, for the financial interest of the United States was demonstrated below to the same extent, and to a greater, than was done in the *Lustgarten* case.

Here, the operation of the vessels was carried on in the name of the United States, *i.e.*, the trade name owned by the United States. There, it was done in the trade name of the United States. Clause 17, Lustgarten record, p. 181. Temporary Operating Agreement, Clauses 4 and 6. R. 23,

24. Even if the operation had been carried on in the name of the agent only, the principal would be obliged to indemnify the agent for moneys disbursed by him in satisfying judgments for tort caused by the negligence of employees. Rest. Restitution, §98, Comment on Clause b, Illustration 5. *Moran Towing & Transportation Co., Inc.* v. *Navigazione Libera Triestina, S.A.*, 92 F. (2d) 37 (1927), cert. denied 302 U. S. 744. *A fortiori*, the obligation exists when the business is carried on in the principal's name.

In cases like these, the agent is not at fault, personally. The fault is that of the employee. The employer may have to pay, but he is not at fault. It is liability without fault. (1932) 81 Pa. L. Rev. 130 at 142. Where the agent who is held liable as an employer is not at fault there is no reason to deny him indemnity. 45 Harv. L. Rev. 349, 351, note 10. Williston on Contracts, vol. 4, §1026, p. 2842.

Indeed, where, as in this case and in the *Lustgarten* case, the business is carried on in the name of the principal, the agent is generally held not to be an employer, and, therefore, not liable at all. Rest. Agency §358. We shall deal with this in Point 2.

In both the *Lustgarten* case and in this case the obligation of the principal to indemnify the agent did not arise solely by operation of law, as noted above, but by express contract as well. In the *Lustgarten* case the United States, acting through the Fleet Corporation, agreed expressly to bear the operating expenses. Clause 3, Lustgarten Record, page 177. Here, the United States, itself, agreed expressly to do so. Temporary Operating Agreement, Clauses 6 and 7, R. 24, 25.

Operating expenses in a business of this kind include disbursements made by an agent, i.e., a receiver, to satisfy

tort judgments caused by the negligence of employees. It has been so held.

Reconstruction Finance Corporation v. *Missouri-Kansas-Texas R. Co. et al.*, 122 F (2d) 326, 335 (1941);
Bereth v. *Sparks*, 51 F. (2d) 441 (1931).

Congress has passed a statute which directs that such disbursements be included among operating expenses, even when they result from torts occurring before receivership or bankruptcy, 11 U. S. C. §205 (n).

Furthermore, in the case at bar the legal representative of the United States appeared, with authority, and informed the court of the financial interest of the United States. R. 13, 83, 84, 85. The United States thus recognized and asserted its obligation to its agent to indemnify it in case it should be adjudged liable for the negligent tort of an employee.

Furthermore, the defendant was ready and offered to prove that in actual practice the United States reimbursed the agent for the money used to pay such judgments on the ground that such disbursements were part of the operating expenses. The offer was refused. R. 88.

Surely, if this case turns on the existence of an obligation by the United States to reimburse the agent, and there is any room for controversy as to what is meant by "expenses incident to the management and operation of the Line, the maintenance and operation of the vessel, and all other business activities pertaining thereto" the agent should be permitted to show what the words meant to the parties to the contract in actual practice. Temporary Operating Agreement, Clauses 6, 7, 19, R. 24, 25, 29.

Cavazos v. *Trevino*, 73 U. S. 773, 785 (1867);
Sherman v. *Consolidated Dental Mfg. Co.*, 202 Pa. 446 (1902);
Goddard v. *Crefield Mills*, 75 Fed. 818 (1896);
Block v. *The Columbian Insurance Co.*, 42 N. Y. 393, 400 (1870);
U. S. Printing & Lithograph Co. v. *Powers*, 233 N. Y. 143, 151 (1922);
N. Y. Central Railroad Co. v. *Stoneman*, 233 Mass. 258, 263 (1919);
Crowe v. *Bixby*, 237 Mass. 249, 253 (1920).

The parol evidence rule has no application in any event to a suit where the contract is involved merely collaterally.

Robert v. *United States Shipping Board Emergency Fleet Corporation*, 240 N. Y. 474 (1925); (opinion by CARDOZO, J.);
Indianapolis Glove Co. v. *United States*, 96 F. (2d) 816, 819 (1938).

At the very least, therefore, if the judgment of the Circuit Court should be reversed, on the ground that the financial interest of the United States should have been shown independently and was not, there should be a new trial so that the agent *and the United States* may have a fair opportunity to present relevant evidence.

Even where it has been held that the *Lustgarten* case stands for the proposition that the financial interest of the United States must appear independently, it has been held also that the burden is on plaintiff to show that the United States has no financial interest. *Weinstein* v. *Black Diamond Steamship Corporation*, 40 F. (2d) 590, certiorari denied, 283 U. S. 837.

Here, the plaintiff did nothing except to put in evidence the operating agreement and the testimony of a witness who said that the crews of vessels were not employed by the defendant in any respect. Not only did the plaintiff fail to carry his burden, but he was successful in obtaining a ruling from the court that prevented the defendant from adducing proof which it was plaintiff's duty to bring forward.

2. *The irrelevancy of the contract provisions relating to insurance and a bond.*

The provisions of the contract respecting liability insurance and a liability bond, (clauses 14 and 18, R. 28, 29,) and the extravagant and unsupported statements in petitioner's brief with respect to the existence and the provisions of the liability insurance and the bond, do not serve to carry the petitioner's burden in any respect. Petitioner's Brief, pp. 13, 20, 22. The record contains only the provisions of the operating contract, and the statements of petitioner's counsel with respect to the provisions of a liability insurance policy are not only unsupported but untrue. Petitioner's Brief, pp. 13, 20.

The contract provided merely that the agent should provide protection and indemnity insurance "for the account of the Owner", i. e., insuring the United States. Clause 14, R. 28. There is no provision in the contract requiring the agent to insure itself. Whether it did so independently of any provision of the contract is not a matter of record in this case. Just what insurance was obtained for the United States does not appear, although counsel for the defendant informed the trial court that he was ready to prove that the insurance was subject to a "deductible" which left the United States wholly uninsured for a part of what might be paid in any particular case. R. 89, 90.

The bond referred to in Clause 18 of the contract (R. 29), and which the petitioner refers to as a liability bond, (Petitioner's Brief, p. 20) had nothing to do with tort claims. The contract required the usual surety bond to cover the honest and faithful performance of the financial aspects of the Governmental enterprise.

At all events, proof that the United States and its agent were fully insured for liability and loss on account of negligent torts, which, seemingly, they were not, would not show that the United States did not have an independent financial interest in the judgment against its agent. It would prove exactly the contrary, for it would show that the United States, realizing that its financial interest was directly involved, did as any business man would do, that is, paid the premium as an operating expense and insured the risk.

Accordingly, the taking out of an insurance policy to cover the risk proves nothing which can be of any help to the petitioner in this case.

Finally, what is the financial interest of the United States if the insurance company is insolvent? And what is its financial interest if the agent fails, with good excuse, to obtain insurance? This can and has happened.

3. *The Lustgarten case does not require that the financial interest of the United States be demonstrated.*

So far we have assumed that there is something to be said for the contention that this court in the *Lustgarten* case meant to say that the financial interest of the United States must be shown in every case as a jurisdictional fact.

However, such an intention is improbable, and is not to be inferred from what was actually said. In the first place, such a holding would lead inevitably to the trial of

collateral issues without end, and, therefore, would be an inappropriate criterion for the application of a statute. In a given case the ultimate obligation of the United States to indemnify its operating agent might depend on the state of the accounts between them or on various defenses and counter-claims. The collateral controversies which would arise in determining such a matter could be endless. The opinion in *Weinstein* v. *Black Diamond Steamship Corporation*, 40 F. (2d) 590, 592, is illustrative. Therefore, it is unlikely that the court intended to construe the Suits in Admiralty Act in such a way as to make the financial relations between the United States and its operating agent a collateral issue in every negligence action in which someone should think that it suited his interest to sue the agent at common law rather than the United States in Admiralty.

In the second place, an examination of the basis of the decision in the Lustgarten case makes it probable that the court meant to decide that the Fleet Corporation and Consolidated Navigation Company were public agents, as to which Congress could prescribe, if it saw fit, an absolute or a partial immunity.

In the brief submitted on behalf of the Fleet Corporation and Consolidated Navigation Company it had been contended that both were public agents and therefore wholly immune. Petitioner's Brief, Lustgarten case, pp. 28 and 29. Therein it was argued that Section 8 of the Suits in Admiralty Act and the case of *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387, required such a conclusion. But the court did not conclude that Congress intended to prescribe a complete immunity. It held that Congress intended to prescribe a partial immunity, and, as a part of the mechanics for accomplishing this result, to submit the United States, or its wholly owned corporation, as a personal defendant, but in Admiralty only.

Thus, the reference to the source of the money which might be used to pay judgments is to be taken as the court's statement of a legal conclusion from its decision that both the Fleet Corporation and Consolidated Navigation Corporation were public agents, i.e., acting "for the United States." The reference in the opinion to Section 8 of the Suits in Admiralty Act and to *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387, would seem to indicate that the court accepted, in part at least, the contention of the petitioners in that case that Congress intended to use its power to extend its immunity to public agents, but only to the extent indicated by the holding of the court. *Cf. Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524 (1940).

Since the Lustgarten case was decided, this court has stated with clarity some of the principles which should guide in determining the Congressional intent with respect to extending immunity to public agents.

> *Merchant Fleet Corporation* v. *Harwood*, 281 U. S. 519 (1930);
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> *Federal Land Bank* v. *Priddy*, 295 U. S. 229 (1935);
>
> *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381 (1939);
>
> *Reconstruction Finance Corporation* v. *Menihan*, 312 U. S. 81 (1940).

But in none of these cases has the power of Congress ever been questioned. As indicated in the *Keifer* case, the question is always "has it done so?" 306 U. S. 381, at 389.

The *Lustgarten* case established by a direct decision the Congressional intent with respect to public agents such as the one involved herein. Moreover, the construction of the Congressional intent, as therein set forth, was not such as to bring "governmental immunity from suit into disfavor." 306 U. S. 381, at 391. If anything, that construction was

such as to deserve the favor of and preservation by this court, for it did not deny to meritorious suitors all remedy for their injuries, but merely prescribed a substitute remedy in Admiralty which, while exclusive, was and is adequate.

This case, therefore, represents an attempt to sue the United States elsewhere than in Admiralty under the pretense that a suit against a public agent of the United States is not within the prohibited area defined by the Suits in Admiralty Act. That was tried in 1929 and failed then. Thirteen years later it should not succeed.

POINT II.

ROOSEVELT STEAMSHIP COMPANY WAS NOT THE EMPLOYER OF THE NEGLIGENT MEMBERS OF THE CREW WHO COMMITTED THE TORT.

Much of the argument which would appear under this heading if this were the only point involved already appears under the previous point. There is no need for repetition of the argument. For convenience, however, the relevant authorities will be re-cited.

The question of who employs the crew of a United States-owned merchant vessel, the United States or its agent, has not been decided by this court. Moreover, this court declined to decide it when asked to do so in the *Quinn* case, 314 U. S. 682. If certiorari had been granted in that case, it might have resulted in bringing "governmental immunity into disfavor." 306 U. S. 381, at 391. Mrs. Quinn could not sue the United States under the Suits in Admiralty Act because the tort was not maritime and, therefore, she could not sue the United States at all. If she had not been permitted to keep the judgment against the agent, however wrong the decision was which gave it to her, she would have been unable to sue anybody for the tort. Although she did

have a right to obtain Federal compensation from the United States, the petition for certiorari did not so inform this Court.* That is not the case here. The Bradys were given a right to sue the United States, which right, by free choice, was not exercised because Mrs. Brady preferred the compensation remedy against the United States. See Statement, p. 2 of this brief.

Therefore, when the present suit is brought against the public agent on the pretense that it is an actual third party rather than a representative of the United States, there is every reason to decide the basic question: who employed the crew?

The question should be decided now and put to rest.

So far as concerns those who write the contracts of agency with which we are concerned, there is no question as to what is the precise nature of the relationship between the United States and the private operator-public agent who manages government-owned vessels for the United States.

It is only when a court proceeds to re-write the contract otherwise than the parties intended, as in the *Quinn* case, that confusion arises. *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190. However, the parties are adequate to the situation which then arises. They re-write their contracts in the hope that, finally, they will be in such form that the mistakes of the court will not be repeated. Thus, in this situation, as a result of what happened in the *Quinn* case,** the following clauses have been written into the agency contracts which the United States now makes with operating agents through the agency of the War Shipping Administration.

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* So we are informed by the one who wrote it.

** This is known from persons who participated in the conferences which led to the amendments.

"ARTICLE 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time."

"ARTICLE 3A. To the best of its ability, the General Agent shall for the account of the United States:

(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder." Fed. Reg. v. 7, pp. 7561, 7562.

The *Quinn* case holds that a managing agent for the United States employs the crews of government-owned merchant vessels on the agent's own behalf. It had to hold that in order to hold the agent liable, but at no place in the opinion does a direct statement to that effect appear.

The court first makes the point "That a principal is liable for a wrong does not necessarily immunize his agent." 121 F. (2d) 190, at 191.

That, of course, was true, but it did not decide whether the defendant was liable in the first place. The court, for the purposes of this statement, merely assumed that the defendant was liable, and then reasoned that because in some cases both principal and agent can be held liable, such instances of double liability were relevant to the facts of that case. That was a complete *non-sequitur*. An agent can be liable for his own tort. A principal can be liable along with the agent for the same tort. But it does not follow that there cannot be cases where, assuming that it is the principal who is liable, *ex hypothesis* the agent cannot be liable as a principal. In some cases the very fact that one person is held liable as a principal means that someone else is not a principal, and, therefore, cannot be held liable by way of *respondeat superior*.

In explaining its decision the court said, at page 191 that:

> "Common sense and the precedents make appellant liable on the facts of this case."

Without doubt, reliance on proper precedents is a rational legal process, but there is no available means by which anyone can ascertain what the court's idea of "common sense" may be.

However, the precedents on which the court relied appear in the opinion to be a single case, namely, *United States Shipping Board Emergency Fleet Corporation* v. *Greenwald*, 16 F. (2d) 948 (1927).

Apart from such a citation of precedent, no reason was given for the court's conclusion except that the powers given by the United States to its agent gave the agent *de facto* control which it was not shown had been actually taken away by any interference on the part of the United States. This is insufficient for the holding made.

A superior servant, such as a general manager or a captain of a vessel, has the same *de facto* control, and, when a captain is on his vessel at sea, who is there to interfere with that control? And, yet, it is well known that such persons are servants at all times, albeit superior servants. Rest. Agency, Section 220, comment on subsection (1):(a).

Accordingly, the question which was before the court in the *Quinn* case did not depend on whether Southgate Nelson Corporation had a *de facto* control, but on the terms which governed it in the exercise of that control as shown by the contract with the United States or by any other relevant evidence. Rest. Agency, Section 220, and following statement.

The Circuit Court of Appeals apparently did not inquire into or pay attention to this vital matter. Indeed, when the court noted the disturbing circumstance that the compensation of the agent was "relatively small" (in fact it was nothing except expenses, as the court was informed, Appellant's Brief, p. 18) it said that this circumstance was "of no importance for that was a matter of contract between it and the Commission and cannot affect appellant's liability to third persons." 121 F. (2d) 190, at 192.

To say that the contract between the parties is not the only evidence which may determine the nature of the relationship as it affects third parties is, of course, true. *Robins Dry Dock & R. Co.* v. *Navigazione L. Triestina, S. A., et al.*, 261 N. Y. 455, 463 (1933). Other facts and circumstances may be relevant. But it is an entirely different and erroneous statement to say that a matter of contract between the principal and agent is of no importance at all in determining the agent's relationship to third persons. The following cases and authorities are to the contrary:

Robert v. *United States Shipping Board Emergency Fleet Corporation*, 240 N. Y. 474 (1925) (opinion by Cardozo, J.);
Folwell v. *Miller*, 145 Fed. 495 (1906), Second Circuit;
Wahlheimer v. *Hardenbergh*, 217 N. Y. 264 (1916) (opinion by Cardozo, J.);
Smith v. *Rutledge*, 332 Ill. 150 (1928);
Bath v. *Caton*, 37 Mich. 199, 202 (1877);
Ellis v. *Southern Railway Co. and P. I. Welles*, 72 S. C. 465 (1905);
Johnson v. *City of Memphis*, 77 Tenn. 125 (1882);
Brown v. *Lent*, 20 Vt. 529 (1848);
Parker, et ux. v. *Cone, et al.*, 104 Vt. 421 (1932);
City of Los Angeles v. *Los Angeles Pacific Navigation Co. et al.* (1927), A.M.C. 1778, 84 Cal. App. 413 (1927);
Restatement of the Law of Agency, § 1, 2, 5, 219, 220, 221, 222, 250, 251, 255, 358, 361, 362.

The one precedent cited by the court, namely, the *Greenwald* case, *supra*, proceeds upon the theory that the managing agent was an owner *pro hac vice*. What the contentions of the parties were in that case is not known, but it is inferable from the opinion that both parties defendant were endeavoring to escape from the law of the District of Columbia, and it suited that purpose to claim that A. H. Bull & Company, a New Jersey corporation, was an owner *pro hac vice*. If so, it was thought that the District of Columbia law would not apply. But the court held that even though A. H. Bull & Company was the *pro hac vice* owner, the District of Columbia law applied. 16 F. (2d) 948, at 951.

A holding that an agency contract such as the one involved here is a bare-boat or demise charter cannot be justified on any theory of law.

See Robinson on Admiralty, p. 594, and cases cited in the notes; 46 U.S.C., §186.

Thus, the *Quinn* case has no rational basis for the result which the court reached, and should now be overruled.

POINT III.

THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IN DISMISSING THE COMPLAINT, ON THE GROUND THAT THERE WAS NO LIABILITY ON THE DEFENDANT. HOWEVER, IF IN THIS CASE, AS IN THE LUSTGARTEN CASE, THIS COURT SHOULD CHOOSE TO ASSUME THAT THE COURTS BELOW WERE CORRECT IN THEIR DECISIONS ON THE MERITS, OR SHOULD DECIDE THE MERITS ADVERSELY TO THE CONTENTION MADE HEREIN, THIS COURT SHOULD THEN HOLD THAT THE DISTRICT COURT DID NOT HAVE JURISDICTION TO HEAR THE CAUSE BY REASON OF THE PROVISIONS OF THE SUITS IN ADMIRALTY ACT.

Respectfully submitted,

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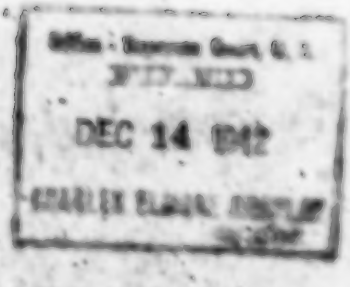

No. 269

In the Supreme Court of the United States

OCTOBER TERM, 1942

MARGARET M. BRADY, AS ADMINISTRATRIX OF JAMES P. BRADY, DECEASED, PETITIONER

v.

ROOSEVELT STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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ROOSEVELT STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

In *Johnson* v. *Fleet Corporation*, 280 U. S. 320, this Court held that no suits on maritime causes of action could be brought against the United States under the Tucker Act or in the Court of Claims or against the United States Shipping Board Emergency Fleet Corporation or other agents of the United States in state or federal courts, and that the Suits in Admiralty Act (46 U. S. C. 741–752) provided the exclusive remedy.[1]

[1] The doctrine of the exclusiveness of the remedy afforded by the Suits in Admiralty Act is discussed in the Government's brief in *Clyde-Mallory Lines* v. *Steamship Eglantine and United States*, No. 265, this Term, argued November 20, 1942.

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Petitioner contends that the *Johnson* case does not apply where the defendant operator of the ship is a "private operator" and "independent agent" (Pet. 20) to whom the Government is not liable for the judgment to be recovered. The majority of the court below held that the *Johnson* case precluded the maintenance of this suit even though the United States might not be liable by virtue of the agency agreement with the defendant operator for any judgment recovered in this case. The dissenting judge was of the opinion that the controlling test was whether or not the United States was liable and that since, in his opinion, the Government was not liable, this suit could be maintained. Neither the majority nor the dissent doubted that if the Government were liable, this suit could not be maintained and that the remedy under the Suits in Admiralty Act would be exclusive.

We are putting to one side the question of the responsibility of the United States under the agreement in this case for any judgment which might be entered against the respondent, because that question is of subordinate general importance and may not be controlling on the important question before the Court. The important question is whether and to what extent the *Johnson* decision is to be followed in suits against private persons where Government-owned ships are operated through private parties.

It would seem that the *Johnson* decision precludes the instant suit. One of the actions at law

in which judgment was reversed in the *Johnson* decision involved a ship operated by the Consolidated Navigation Company, a private concern, under an agency agreement with the Fleet Corporation (No. 32, October Term, 1929). The suit at law against the Consolidated Navigation Company was held required to be dismissed along with the various other suits brought against the United States and the Fleet Corporation. The agency contract in that case (R. 177–181, No. 32, October Term, 1929) was substantially similar to the contract here involved (R. 34, 36). Whether the Government would have been liable there for the judgment was not explicitly adjudicated by this Court. However, the Court observed that "Directly or *mediately*, the money required to pay a judgment against any of the defendants in these cases would come out of the United States." [Italics supplied.] 280 U. S. at 326–327. There is nothing in the opinion to indicate that this statement was not intended to refer to the judgment against the Consolidated Navigation Company,[1] and the statement would seem to be equally pertinent in this case.

The Court may have had in mind that the joint judgment of the district court against both the private concern and the Fleet Corporation estab-

[1] The district court had rendered judgment against the Consolidated Navigation Company as well as the Fleet Corporation in the sum of $10,226.50 (R. 13, No. 32, October Term, 1929), and the circuit court of appeals had affirmed that judgment (*ibid.*, R. 188). This Court reversed the judgment and remanded the cause with directions to dismiss.

lished that payment would come from the United States; however, it would have been possible to reverse the judgment merely as to the Fleet Corporation, allowing it to stand against the private party. Further, the Court's omission of discussion of the precise question of reimbursement to the private party by the Fleet Corporation, plus its use of the word "mediately," suggests that the Court was thinking not merely of technical legal liability but instead of the impact on the Government which the liabilities of its private agents would have upon its expense of operation as a whole. This approach seems indicated by the Suits in Admiralty Act itself, which subjects the United States to libels *in personam* on the basis of mere ownership, irrespective of agency, for *in rem* liabilities of its vessels (sec. 2).

Moreover, the scope of the Suits in Admiralty Act is based on operation *for* as well as operation *by* the United States (secs. 1, 2; see also the *Johnson* case at pp. 325, 326; 59 Cong. Rec. 1680). Hence it would seem that orthodox principles of agency and of rights of indemnification and reimbursement do not have their usual significance in this connection. While orthodox principles and the terms of the agreement between the Government and the operator will govern their rights and liabilities *inter se*, those principles would appear to be suspended by the Suits in Admiralty Act so far as concerns the remedies available to third persons. The status of the operator, *vis à vis* third parties, would appear to be more like that of the

contractor in *Yearsley* v. *Ross Construction Company*, 309 U. S. 18, than that of the contractor in *Alabama* v. *King & Boozer*, 314 U. S. 1.[3]

In any event, if the *Johnson* case is to be limited, it would seem that the present case should be decided on its narrow facts because the agency agreement involved is not the standard form of agreement in current use by the War Shipping Administration. The question is given current practical importance to the Government by the fact that the General Agency Agreement now in use by the War Shipping Administration contains a sweeping covenant for indemnification by the Government of the General Agents. Article 16 (a) of the standard form of agreement[4] now in use provides:

> ARTICLE 16. (a) The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected

[3] In the *Yearsley* case, the Court held that an independent contractor engaged by the United States was sufficiently a "representative" of the Government to be immune from liability to third persons in performing its contract. In the *King & Boozer* case, a cost-plus contractor, an agent of the Government only "in a loose and general sense" (p. 12), was held not entitled to the tax immunity of the United States.

[4] Copies of this form of agreement have been filed with the Court.

> with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands by passengers, troops, gun crews, crew members, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo, or personal effects, claims for damages for personal injury or loss of life, and claims for maintenance and cure.

Whatever may be the limitation on it, we submit the *Johnson* case should be applied at least where the Government is ultimately liable to the agent. However, a rule going no further may be unsatisfactory in cases where the Government's ultimate liability depends on questions of degree of fault, questions of construction of particular agreements, and other questions which can be determined only after full trial. Both the principle that the Government's liability to suit should be strictly construed[3] and the legislative history of the Act call for the more definitive rule that the remedy under the Suits in Admiralty Act is exclusive irrespective of ultimate liability of the Government to the agent in a technical legal sense, if

---

[3] As this Court said in discussing the Suits in Admiralty Act in *Eastern Transportation Company* v. *United States*, 272 U. S. 675, 686:

"The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires. * * *"

as a matter of practical business these potential liabilities will add to the Government's costs of operating vessels.

The broader result finds support in the legislative history of the Suits in Admiralty Act, which establishes that the legislation was intended to apply in the case of government vessels operated by private persons. During the debates on the measure, Representative Volstead, its sponsor in the House, expressly so stated (59 Cong. Rec. 1680):

> Mr. WHITE of Maine. Would this bill apply to Shipping Board vessels that are allocated to private concerns and are being operated by private concerns?
>
> Mr. VOLSTEAD. Yes; it covers all ships owned by the Government.

Accordingly, it is respectfully submitted that the *Johnson* decision should be deemed controlling and the remedy under the Suits in Admiralty Act held exclusive, at least where the Government is liable for the judgment, if any, recovered against the operator of the vessel.

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DECEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

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Supreme Court of the United States

No. 269, October Term, 1942.

MARGARET M. BRADY, as Administratrix of James P. Brady, Deceased,
Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITION OF RESPONDENT FOR REHEARING.

Vernon Sims Jones,
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Supreme Court of the United States

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ROOSEVELT STEAMSHIP COMPANY, INC.,
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No. 269.
On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITION OF RESPONDENT FOR REHEARING.

Respondent, Roosevelt Steamship Company, respectfully petitions for a rehearing.

The unanimous opinion of this court was rendered on January 18, 1943, and reversed the decision of the Circuit Court so far as it depended on what this court held to be a misconstruction of the Suits in Admiralty Act. This petition does not discuss the points considered and decided finally in the opinion.

This petition is filed because there is another ground, depending solely on a question of law, which supports the decision of the Circuit Court. The respondent claimed in its brief in this court that it was entitled to have this court decide that point of law and, apparently, neither respondent's claim in this regard nor the point of law was considered by this court.

This court, in its opinion, recognized that there was another ground for supporting the decision of the Circuit Court, but, instead of deciding the point of law involved,

referred it to the Circuit Court of Appeals. This court said:

> "Whether a cause of action against respondent has been established is, of course, a different question as the issues involved in *Quinn* v. *Southgate Nelson Corp., supra,* indicate. The Circuit Court of Appeals did not reach that question. Accordingly, we reverse the judgment and remand the cause to it."

Thus, it seems established that respondent is *entitled* to an appellate review by some court of its contention that the District Court should have dismissed the complaint for failure of proof connecting this respondent with the tort, and, therefore, that judgment cannot be entered for the plaintiff-petitioner until that question is decided.

However, since respondent asserted that it was *entitled* to have this question reviewed by this court, irrespective of what the Circuit Court had or had not done, it seems that respondent has been invited to be content with less than it asserted, and still asserts, is its right, and that the invitation has been conveyed without a ruling that respondent does or does not have a *right* to have the question decided by this court.

Therefore, respondent asks this court to rule either that it has or has not a *right* to have this question of law decided by this court, and if respondent has such a right, to decide it.

1. The issue which was not considered by this court, and which is sufficient to support the decision below.

In the District Court respondent moved to dismiss the complaint because there was not enough evidence to connect this respondent with the cause of action. R. 83, 103. To the denials of these motions exceptions were taken. R. 83, 103.

This raised a question of law, undiluted by factual considerations. The Circuit Court, to which the question has been referred, is not empowered to decide questions of fact in a jury case.

Respondent argued this question of law in Point 2 of its brief in this court.

In Point 3 of its brief, respondent asked this court to "affirm the judgment of the Circuit Court of Appeals in dismissing the complaint, on the ground that there was no liability on the defendant."

Furthermore, at pages 12 and 13 of its brief respondent asserted that it was entitled to a decision of this point by the Supreme Court.

On page 12 of its brief respondent said:

> "If, * * * the agent did not employ the members of the crew who committed the tort, the judgment of the Circuit Court which dismissed the complaint is correct, although for a further and different reason from the one given by the Circuit Court of Appeals."

On page 13 of its brief respondent said:

> "Defendant below raised and preserved the point properly, and is entitled to have it passed on in this court. R. 83, 103.
>
> *LeTulle* v. *Scofield*, 308 U. S. 415, 421 (1939);
> *Ryerson* v. *United States*, 312 U. S. 405, 408 (1940);
> *Bondholders Committee, etc.* v. *Commissioner of Internal Revenue*, 315 U. S. 189, 192, note 2 (1942)."

The precise point is that *as a matter of law* the District Court should have dismissed the complaint because there was not enough evidence to prove a cause of action against

this respondent or against anyone for whom it may be responsible. This point is no after-thought. It has been in the case from the very beginning.

The respondent, therefore, asserts that, as a respondent who was *successful* in the Circuit Court in obtaining a dismissal of the complaint for what now appears to have been a wrong reason, respondent has a *right* to have this court decide whether the dismissal of the Circuit Court was right for another reason, and that, correspondingly, respondent is not accorded its full right when this court refers the point to the Circuit Court.

2. *The apparent reasons why the above mentioned matters were not considered by this court.*

Respondent can suggest only that the court was so preoccupied with the question of the construction of the Suits in Admiralty Act, that, inadvertently, it failed to note respondent's other contention fully.

Moreover, respondent is led to this conclusion the more readily because, on the very day when the decision in the case at bar was rendered, this court rendered another decision in which, at the request of a respondent *who had been successful* in the Circuit Court, it considered and decided a point which, if decided in respondent's favor, would have supported the Circuit Court's decision in that case.

United States of America, ex rel. Marcus, et al. v. *Hess*, No. 173, October Term, 1942, decided January 18, 1943.

In that case, as in this, the Circuit Court had not considered or "reached" the point. But that did not deter this court from ruling on it, or evoke a ruling that the point should be referred to the Circuit Court for a ruling.

Likewise, on January 4, 1943, this court in another case considered and decided a point rais d by a successful respondent to suport a decision by a Circuit Court.

Marshall v. *Pletz*, No. 93, October Term, 1942, decided January 4, 1943.

In that case, the point was raised for the first time in this court, and, indeed, as late as on the argument.

Respondent here, however, raised the point on which it has relied in this court, by motion in the District Court. R. 83, 103.

3. *The issue inadvertently not considered by this court is substantial and independently will sustain the decision of the Circuit Court.*

This court has said, in similar circumstances, that a litigant's *right* is involved. *Langnes* v. *Green*, 282 U. S. 531, at 538.

So far as we know, it has never been said that a successful respondent's "right" in this respect depends on the favor of this court.

However, if a successful respondent's "right" to support a decision of the Circuit Court depends on this court's favor, and is analogous to that of a party who *loses* in the Circuit Court of Appeals and petitions for certiorari, then, it is submitted that there is need for an amendment of the language which has been used in previous cases to describe what was being done, and that this respondent, which has asserted that it has a *right*, may be entitled, at the least, to a decision that it does not have the right which it has claimed.

On the other hand, if respondent has a right to this court's judgment with respect to the legal question on which it has relied to support the judgment of the Circuit Court, then this court has omitted to decide an issue which is substantial and which will independently sustain the Circuit Court's decision.

The Circuit Court ordered that the complaint be dismissed. If respondent's motion to dismiss in the District Court should have been granted as a matter of law, the decision of the Circuit Court was correct and should be sustained

For practical reasons this court's action in referring to the Circuit Court the question of law as to the proof of a cause of action is tantamount to sending an accused person to the executioner for relief. That results from the fact that the Circuit Court is already bound by its decision in the case of *Quinn* v. *Southgate Nelson Company*, 121 F. (2d) 190 (1941), which respondent contends is erroneous, to decide that the crew of the *S. S. Unicoi* were respondent's servants, and, therefore, that plaintiff proved a cause of action against respondent.

If it be suggested that it is open to respondent to induce the Circuit Court to reverse its previous decision, and, then, if it should fail, to petition this court for certiorari, it is submitted that the suggestion is illusory for two reasons. First, this court's several references to the *Quinn* decision in the opinion, and its failure to disturb it, or even to indicate that it is in need of any re-examination, will justify the Circuit Court, whose decision is under attack, in believing that the *Quinn* case has this court's blessing. In the second place, a petition for certiorari can be denied. And, if the respondent now has a right to have the question of law on which it relies decided by this court, untrammelled by any previous erroneous decision except that of a lower court, it does not receive its right if an ultimate decision by this court is thus made to depend on favor.

Nevertheless, if this court does approve the decision in the *Quinn* case which holds that the "private operator" is the employer of the crew, and, therefore, without saying it, has left it to the Circuit Court to affirm the judgment

perfunctorily, petitioner does not ask for a rehearing. However, in that event, it would be appreciated if this court would spare both parties the futility of arguing a cause already lost both in the Circuit Court and in this court, by directing that the judgment of the District Court be affirmed.

If, on the other hand, this court has an open mind on the question, respondent asks that the respondent's *right* to a decision on the point be recognized and a rehearing be granted.

Respectfully submitted,

VERNON SIMS JONES,
RAYMOND PARMER,
Attorneys for Respondent.

CERTIFICATE

I, VERNON SIMS JONES, attorney for the above-named respondent, do hereby certify that the foregoing petition for the rehearing of this cause is presented in good faith, and not for delay.

VERNON SIMS JONES,
Attorney for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 269.—October Term, 1942.

Margaret M. Brady, as Administratrix of James P. Brady, Deceased, Petitioner,
vs.
Roosevelt Steamship Company, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 18, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

S. S. Unicoi was a vessel owned by the United States Maritime Commission and operated for it by respondent under a contract covering this and other vessels. The contract[1] recites that it was made pursuant to § 707(c) of the Merchant Marine Act of 1936 (49 Stat. 2009, 46 U. S. C. 1197(c). See § 704, 46 U. S. C. 1194), the Commission having advertised the line for charter and having failed to receive satisfactory bids. Respondent is a private corporation, none of whose stock is owned directly or indirectly by the United States.

The deceased was a United States customs inspector. While boarding the vessel on his official duties in July 1938 a rung of the ladder which he was climbing broke. The injuries which resulted caused his death. At the time of the injury the vessel was docked at a pier in New York City.

[1] Respondent was designated as a managing agent for the Commission as owner "to manage, operate, and conduct the business of the Line . . . for and on behalf of the Owner and under its supervision and direction." Respondent agreed "to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe" and "to conduct its operations with respect to the vessels . . . in full compliance with the applicable provisions of law". Respondent agreed "subject to such regulations or methods of supervision and inspection as may be required or prescribed" by the Commission to "exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts". Respondent did not share in profits but was entitled to reimbursement for expenses under a provision of the contract which stated: "The Owner agrees to pay to the Managing Agent the actual overhead expenses of the Managing Agent determined by the Owner to have been fairly and reasonably incurred and to be properly applicable to the management and operation of the Commission's vessels under this agreement."

Petitioner, the widow, sued as administratrix to recover damages for the benefit of herself and the children. That suit was brought in the New York Supreme Court but removed to the federal District Court. Respondent moved to dismiss on the authority of *Johnson* v. *Emergency Fleet Corp.*, 280 U. S. 320. That motion was denied and a trial to a jury on the law side of the court was had. A verdict for petitioner was returned. On appeal the judgment was reversed with directions to dismiss the complaint, one judge dissenting. The Circuit Court of Appeals stated in reaching that result that the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. §§ 741, 742) as construed by the decision in the *Johnson* case made the remedies afforded by that Act the exclusive ones, viz. a libel *in personam* against the United States or the Maritime Commission. 128 F. 2d 169. We granted the petition for a writ of certiorari because of the public importance of the problem.

We agree with the court below that this was a maritime tort over which the admiralty court has jurisdiction. *Vancouver S. S. Co.* v. *Rice*, 288 U. S. 445. *The Admiral Peoples*, 295 U. S. 649. And we may assume that petitioner could have sued either the United States or the Commissioner under the Suits in Admiralty Act. In any event such a suit would be the exclusive remedy in admiralty against either of them. *Eastern Transportation Co.* v. *United States*, 272 U. S. 675; *Emergency Fleet Corp.* v. *Rosenberg Bros. & Co.*, 276 U. S. 202. And it is likewise clear that the action in admiralty afforded by § 2 of the Suits in Admiralty Act is the only available remedy against the United States or a corporation whose entire outstanding capital stock is owned by the United States or its representatives. *Johnson* v. *Emergency Fleet Corp.*, *supra*. The sole question here is whether the Suits in Admiralty Act makes private operators such as respondent non-suable for their torts.

Fleet Corporation v. *Lustgarten*, 280 U. S. 320, one of the three companion cases to the *Johnson* case, supports the view that it does. In that case a merchant vessel, Coelleda, was owned by the United States and operated for it by the Consolidated Navigation Co. pursuant to a contract made through the Fleet Corporation. A seaman employed thereon sued the Fleet Corporation and the Consolidated Navigation Co. to recover damages for personal injuries sustained in that service. There was a judgment for the plaintiff which was affirmed on appeal. This Court reversed and remanded the cause with directions to dismiss. The *Johnson* case and the

other two companion cases were suits against the Fleet Corporation or the United States. In one opinion dealing with all four cases, this Court said: "Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions." 280 U. S. pp. 326-327. It added that the aim of uniformity would not be established "if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corportion or other agents for enforcement of the maritime causes of action covered by the Act." p. 327. Accordingly it concluded that "the remedies given by the Act are exclusive in all cases where a libel might be filed under it." p. 327. These statements, coupled with the fact that the judgment in the *Lustgarten* case was reversed not only as respects the Fleet Corporation but the Consolidated Navigation Co. as well, support the view adopted by the court below.

Our conclusion, however, is that that position is untenable and that the *Lustgarten* case so far as it would prevent a private operator from being sued under the circumstances of this case must be considered as no longer controlling.

There is ample support for the holding in the *Johnson* case that § 2 of the Suits in Admiralty Act was intended to provide the only available remedy against the United States or its wholly owned corporations for enforcement of maritime causes of action covered by the Act. But there is not the slightest intimation or suggestion in the history of that Act that it was designed to abolish all remedies which might exist against a private company for torts committed during its operation of government vessels under agency agreements.

Sec. 1 of the Suits in Admiralty Act provides that no vessel owned by the United States or a governmental corporation or "operated by or for the United States, or such corporation" shall be "subject to arrest or seizure by judicial process in the United States or its possessions". That section was designed to avoid the inconvenience, expense and delay resulting from the holdings in *The Florence H.*, 248 Fed. 1012, and *The Lake Monroe*, 250 U. S. 246, that libel *in rem* would lie against vessels owned by the United States. See S. Rep. No. 223, 66th Cong., 1st Sess.; H. Rep. No. 497, 66th Cong., 2d Sess. The wording of that section makes clear that the right to arrest or seize the vessel was taken

away whether the vessel was operated by the United States or its wholly owned corporation or for either of them by a private company. To that extent the Act affects remedies which would otherwise exist on maritime causes of action arising out of operation of government vessels by private companies for the United States or its wholly owned corporations. Yet there is no indication whatsoever that it went further and took away any personal remedy which a tort claimant might have against such a private operator. While § 1 abolishes the right to arrest or seize the vessel, § 2 provides that "a libel in personam may be brought against the United States or against such corporation" in cases where "if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained". Sec. 2, however, does not mention private operators. Nor do the Committee Reports advert to private operators, except as they may be affected by § 1. The liability of an agent for his own negligence has long been embedded in the law. *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190, is a recent application of that principle to a situation very close to the present one. But the principle is an ancient one and applies even to certain acts of public officers or public instrumentalities. As stated in *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U. S. 549, 567, "An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts." In that case the Fleet Corporation was held to be amenable to suit. And that policy has been followed. For when it comes to the utilization of corporate facilities[2] in the broadening phases of federal activities in the commercial or business field, immunity from suit is not favored. *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381; *Federal Housing Administration* v. *Burr*, 309 U. S. 242. Congress adopted that policy when it made corporations wholly owned by the United States suable on maritime causes of action under § 2 of the Suits in Admiralty Act. That it had the power to grant or withhold immunity from suit on behalf of governmental corporations is plain. *Federal Land Bank* v. *Priddy*, 295 U. S. 229; *Reconstruction Finance Corp.* v. *Menihan Corp.*, 312 U. S. 81. We may also assume that it would have the power to grant im-

[2] As to the liability of public officials see generally Dunlop v. Munroe, 7 Cranch. 242, 269; Osborn v. U. S. Bank, 9 Wheat. 738, 842, 843; Wilkes v. Dinsman, 7 How. 89, 123; Robertson v. Sichel, 127 U. S. 507; Spalding v. Vilas, 161 U. S. 483; Briscoe v. Lawrence, 2 Blatchford 131; United States v. Bogle, 214 Fed. 283, 290.

munity to private operators of government vessels for their torts. But such a basic change in one of the fundamentals of the law of agency should hardly be left to conjecture. The withdrawal of the right to sue the agent for his torts would result at times in a substantial dilution of the rights of claimants. Assuming that the ordinary rules of agency apply in determining whether the United States or the Maritime Commission is responsible under § 2 of the Act for torts of private operators such as respondent, there would be instances where unless the private operator was liable no one would be. The principal is not liable for every negligent act of his agent. Furthermore, if all suits to enforce maritime causes of action must be brought in such cases under § 2 of the Act the short statute of limitations of two years contained in § 5 is applicable. *Emergency Fleet Corp.* v. *Rosenberg Bros. & Co.*, *supra*. Moreover, if, as apparently was the case here, the claimant was eligible to receive and did receive compensation under the United States Employees Compensation Act (39 Stat. 742, 5 U. S. C. § 751), he is barred from suing the United States for the tort. *Dohn* v. *Davis*, 256 U. S. 421. He may however sue "some person other than the United States"; and in case of recovery the amount is credited on the compensation payable to him. § 777. We mention these matters as illustrations of the practical impact on claimants if it were held that the Suits in Admiralty Act restricted all suits in cases like the present to libels *in personam* against the United States or its wholly owned corporations. We can only conclude that if Congress had intended to make such an inroad on the rights of claimants it would have said so in unambiguous terms. There is one bit of legislative history which it is claimed reveals such a purpose. It is a single statement made by Representative Volstead, sponsor of the bill in the House (59 Cong. Rec. 1680): "Mr. White of Maine. Would this bill apply to Shipping Board vessels that are allocated to private concerns and are being operated by private concerns? Mr. Volstead: Yes; it covers all ships owned by the Government." The reply was accurate. The Act does cover government ships operated by private concerns. For as we have seen § 1 is applicable to that situation as well as to others and takes away the remedy of a libel *in rem*. But it is a non sequitur to say that because the Act takes away the remedy of libel *in rem* in all cases involving government vessels and restricts the remedies against the United States and its wholly owned corporations, it must be presumed to have abolished all right to proceed against

all other parties. Congress in fashioning § 2 of the Act, like this Court in interpreting it in the *Johnson* case, was preoccupied with suits against the United States and its wholly owned corporations. Since it dealt under § 2 only with libels *in personam* against them, the only fair assumption is that it left all personal actions against others wholly unaffected.

It is contended, however, that if the judgment against respondent stands, the United States ultimately will have to pay it by reason of provisions of the contract between respondent and the Commission. It is therefore urged that the United States is the real party in interest. We do not stop to interpret the contract. Even if we assume, without deciding, that the Commission has contracted to reimburse the respondent for such expenditures, it does not affect the result in this case. The right of the private operator to recover over from the United States would be a matter of favor not of right in many cases. For apart from any express contract the agent's right of exoneration or indemnity has not been thought to extend to situations where his liability was based on his own fault. 4 Williston, Contracts (1936 ed.), § 1026. Hence we cannot conclude that in all cases where a private operator of a government vessel under an agency agreement is sued the United States would as a matter of law ultimately be liable to pay in absence of an express provision for exoneration. It is hard to believe that Congress had any such notion when it passed the Suits in Admiralty Act. To attribute that idea to it would be to give the Act a construction which would in practical effect encourage the assumption by the United States of the obligations of private persons.[3]

Moreover, if petitioner had a cause of action against respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained. Cf. *Guaranty Trust Co.* v. *Green Cove R. R. Co.*, 139 U. S. 137, 143. The rights of principal and agent *inter se* are not the measure of the rights of third persons against either of them for their torts. It is, of course, true that government con-

[3] The provision in § 8 of the Suits in Admiralty Act that any final judgment "rendered in any suit herein authorized" shall be paid "by the proper accounting officers of the United States" must be taken to refer only to judgments against the United States or its wholly owned corporations since under our construction the Act does not control or affect actions *in personam* against private operators.

tractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States. *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, was a recent example. In that case the contractor in building dikes in the Missouri River for the United States had washed away a part of the plaintiff's land. We held that the contractor was not liable, saying (pp. 20-21) "that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." But here the situation is quite different. The question is not whether the Commission had authority to delegate to respondent responsibilities for managing and operating the vessel as its agent. It is whether respondent can escape liability for a negligent exercise of that delegated power if we assume that by contract it will be exonerated or indemnified for any damages it must pay. As stated in *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, *supra*, pp. 566-567, "the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him." Furthermore, if the United States were to become the real party in interest by reason of a contract for exoneration or indemnity a basic alteration in that concept (*Minnesota* v. *Hitchcock*, 185 U. S. 373, 387) would be made not pursuant to a Congressional policy[4] but by reason of concessions made by contracting officers of the government. Such a change would be detrimental to the interests of private claimants, as we have said, since it would subtract from the legal remedies which the law has afforded them. Beyond that it would make the existence of a right to exoneration or indemnity a jurisdictional fact. That could hardly help but complicate and delay the enforcement of

[4] Cf. Clyde-Mallory Line *v.* Eglantine, decided January 4, 1943, in which we held that the United States by appearing in an action for libel *in rem* against a government vessel for damages suffered during its operation by the United States could invoke the two-year statute of limitations contained in § 5 of the Suits in Admiralty Act, even though the United States had sold the vessel to a private operator. In that case we were dealing with § 4 of the Act which expressly provides for such an appearance in that type of case and which states that "thereafter such cause shall proceed against the United States in accordance with the provisions of this Act." Accordingly we stated, "The conclusion is inescapable that there is no practical difference between suits against the government as owner of the vessel and against the government as the party in interest when it voluntarily appears to defend its lately sold property against tort liability."

rights based on these maritime torts. At least in the absence of a clear Congressional policy to that end, we cannot go so far.

We hold that the Suits in Admiralty Act did not deprive petitioner of the right to sue respondent for damages for his maritime tort. Whether a cause of action against respondent has been established is, of course, a different question as the issues involved in *Quinn* v. *Southgate Nelson Corp.*, *supra*, indicate. The Circuit Court of Appeals did not reach that question. Accordingly we reverse the judgment and remand the cause to it.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.